United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,735

JAMES B. CAREY AND INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, APPELLANTS,

v.

W. RICHARD CARTER, APPELLEE

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Whether an employee may maintain an action for damages against his employer for breach of a collective bargaining agreement, before procedures provided in the agreement for settlement and arbitration of grievances have been exhausted.

2. Whether a claimed deficiency in representation of the employee by his bargaining representative excused his failure to exhaust such contractual procedures either as a matter of law or on the facts of this case.

3. If exhaustion of contractual procedures is a prerequisite to maintenance of the action and may not be excused, whether the District Court erred in denying Appellants' Motion to Stay all proceedings pending exhaustion of contractual procedures.

INDEX

Table of Cases

* Cases or authorities chiefly relied upon are marked by asterisks.

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OTHER AUTHORITIES

STATUTES

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This case comes before this Court on appeal from an Order of the United States District Court for the District of Columbia denying Appellants' motion to stay the proceedings in the District Court pending exhaustion of Appellee's contractual remedies (J.A. 23). The amended complaint (J.A. 1-6), filed on April 30, 1964, alleged that Appellee was discharged from his employment by Appellant union in violation of the provisions of a collective bargaining agreement regulating the terms and conditions of his employment and that Appellant Carey wrongfully

and maliciously caused said discharge and caused Appellee to be "blacklisted" so that he has been unable to secure other employment in the trade union movement (J.A. 3, 4-5). The complaint alleged damages in excess of $10,000 (J.A. 4, 5). Jurisdiction of the District Court was alleged to exist by virtue of D.C. Code (1961 ed., as amended) § 11-521, and § 301(a) of the Labor-Management Relations Act of 1947, June 23, 1947, c. 120, Title III, § 301(a), 61 Stat. 156, 29 U.S.C. § 185(a) (J.A. 1). Appellants responded to the complaint with their Motion to Dismiss or in the Alternative to Stay, and Motion to Strike filed on May 15, 1964 (JA. 10-11). This Motion was denied in its entirety by order of Judge Holtzoff entered June 22, 1964 (J.A. 23). Notice of Appeal was filed by Appellants on June 26, 1964 (J.A. 24).

The denial of Appellants' Motion to Stay pending exhaustion of contractual remedies was equivalent to the denial of an injunction of an action at law. This Court accordingly has jurisdiction over this appeal by virtue of 28 U.S.C. § 1292(a)(1), Act of June 25, 1948, c. 646, 62 Stat. 929, as amended October 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-808, § 12(e), 72 Stat. 348; September 2, 1958, Pub. L. 85-919, 72 Stat. 1770. *Shanferoke Coal and Supply Co.* v. *Westchester Service Corp.*, 293 U.S. 449 (1935); *Simonds Co.* v. *Local 1330, Hod Carriers, etc.*, 315 F. 2d 291, 295 (C.A. 7, 1963); *International Union, United Furniture Workers* v. *Colonial Hardwood Flooring Co., Inc.*, 168 F. 2d 33 (C.A. 4, 1948); *Gatliff Coal Co.* v. *Cox*, 142 F 2d. 876 (C.A. 6, 1944); *Wilko* v. *Swan*, 201 F. 2d 439 (C.A. 2, 1953), reversed on other grounds, 346 U.S. 427.

STATEMENT OF CASE

Appellant International Union of Electrical, Radio and Machine Workers, AFL-CIO, referred to herein as IUE, is an unincorporated labor organization. Appellant Carey

is President of IUE (J.A. 1).[1] IUE is an employer of a number of field representatives. The field representatives are represented for purposes of collective bargaining by a separate labor organization called the Council of Industrial Organizers, referred to herein as the Council (J.A. 1-2). On or about April 30, 1963, a collective bargaining agreement was entered into between the employer IUE and the Council governing the terms and conditions of employment of IUE's field representatives (J.A. 2). The agreement provided in Article V, Section 3, that field representatives who have completed a six months probationary period "shall be discharged only for just cause." (J.A. 2, 7). It provides also that "Any dispute, disagreement, problem or grievance that may arise between IUE and the Council, or between IUE and a field representative concerning the field representative's employment relationship, shall be handled in the following manner commencing with the Step where the matter in question originated:" (J.A. 7-8). There follows a three step grievance procedure. Failing settlement the agreement provides that either party "may refer the matter to an impartial arbitrator whom the parties shall select" who has authority to rule "on questions affecting interpretation, application, and alleged violations of this Agreement." (J.A. 8). Article V, Section 3 provides that a claim that a field representative has been unjustly discharged may be presented as "a grievance to be settled in accordance with the grievance and arbitration procedures of this Agreement." (J.A. 7).

Appellee Carter was employed as a field representative by IUE from 1949 until on or about September 13, 1963,

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[1] As this case arises on appeal from denial of a motion to stay filed in response to the complaint, the facts consist of the allegations of the complaint and those set forth in affidavits in support of and in opposition to the motion to stay.

when he was discharged (J.A. 2). At the time of his discharge he was in the bargaining unit to which the collective bargaining agreement between IUE and the Council applied.

The amended complaint alleges that Carter's discharge was without just cause, wrongful and unlawful, and in violation of plaintiff's contractual rights. The complaint seeks damages based upon the discharge. (J.A. 5).

While the complaint alleges vaguely that Carter requested Council President Colella to contact IUE President Carey "re my case" and "on his behalf," the complaint does not allege that Carter grieved his discharge or requested the Council to do so (J.A. 3-4). Moreover, Carter's reply affidavit does not contradict affidavits filed in support of the motion to stay pending exhaustion of contractual procedures by Council President Colella and Treasurer Mensch that Carter told Colella he was not contesting his discharge because he was interested in retiring, that he did not grieve his discharge, and that he never requested the Council to seek its arbitration (J.A. 12, 14, 20, 21-23).[2]

In an apparent effort to justify his failure to exhaust his contractual remedies, Carter alleges that the Council was incapable of fairly representing his interests in view of an alleged personal interest of its President Colella in the reasons for Carter's discharge and that the Council "arbitrarily and discriminatorily" refused to seek to remedy his discharge (J.A. 3-4).

The District Court denied the motion to stay without opinion and without hearing any evidence.

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[2] Conflicts in facts raised by the affidavits are set forth in connection with the argument below. As there indicated, appellants believe it unnecessary to resolve them. See III, *infra*, pp. 17-23 and notes 19, 27.

STATEMENT OF POINTS

1. The grievance and arbitration provisions of a collective bargaining contract subject to Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. 185 (a), *supra*, must be exhausted before a suit against the employer for breach of said contract may be filed or prosecuted in court by an employee covered by that contract.

2. There are no allegations in the amended complaint sufficient to excuse compliance with the grievance and arbitration provisions of the collective bargaining contract involved herein, and on which plaintiff relies.

3. Any deficiency in the representation of an employee by his union is a matter between him and his union and may not be remedied by a suit against the employer.

4. Where grievance and arbitration procedures of a collective bargaining agreement have not been exhausted prior to filing of suit, the court may either dismiss the suit or stay all proceedings thereunder pending exhaustion of said procedures.

SUMMARY OF ARGUMENT

I. This case is governed by the developing body of federal law pursuant to Section 301(a) of The Labor Management Relations Act of 1947. *Smith* v. *Evening News Association*, 371 U.S. 195 (1962); *Humphrey* v. *Moore*, 375 U.S. 335 (1964). Recent authorities grounded on federal policy support the view that before an individual employee may maintain a court action based on a collective bargaining agreement, he must exhaust the grievance and arbitration procedures provided in the agreement on which he sues. *Belk* v. *Allied Aviation Service Co.*, 315 F.2d 513 (C.A. 2, 1963). The views of this Circuit appear to be in accord. *Minor* v. *Washington Terminal Co.*, 86 U.S. App. D.C. 71, 180 F.2d 10 (1950).

Here the alleged unjust discharge of Carter was by the terms of the agreement a proper subject for the grievance and arbitration provisions of the Agreement. As there can be no dispute that the contractual remedies were not exhausted, Carter's right to sue his employer directly in damages must hinge upon his ability to demonstrate the grounds for an exception to the rule requiring exhaustion of remedies.

II. Assuming *arguendo* that Carter grieved his discharge and requested the Council to seek arbitration and taking the allegation that the Council did not fairly represent him most favorably to Carter, no exception is warranted to permit Carter to avoid the contractual procedures. Despite a divergency of views as to the remedy available to an employee who has not been fairly represented, none of the recent cases decided under § 301 or in the light of federal policy would support this action. Under one view, the employee must look to his representative for his remedy. *Parker* v. *Borock*, 5 N.Y. 2d 156 (1959); *Falsetti* v. *Local 2026, UMW*, 400 Pa., 145 (1960). Under a second view, without any court action the employee may assume the role of the union and take his grievance up through the contractual procedure to and including arbitration. He may sue for damages only upon refusal of the employer to arbitrate at his request. *Donnelly* v. *United Fruit Co.*, 40 N.J. 61 (1963). A third view analogizes the relationship of union and employee to that of trustee and beneficiary and permits the employee to bring an action comparable to that a beneficiary may bring against the trustee and a third party to compel enforcement of the trustee's duty. *Jenkins* v. *Schluderberg-Kurdle Co.*, 217 Md. 556 (1958).

It is unnecessary to decide here which of these approaches should constitute the federal law, for none advances the plaintiff's cause. Under the first view he may not sue

the employer under any circumstances. Under the second, he is not helped as he has made no attempt to prosecute his own grievance. Under the third view, he gains no greater right than his union would have, and his union could not avoid the grievance and arbitration provisions of the Agreement to maintain a direct damage action. *Drake Bakeries* v. *Local 50*, 370 U.S. 254 (1962).

III. In any event, the complaint and affidavits provide no factual basis for excusing Carter's failure to exhaust the contractual procedures. Although the complaint contains conclusionary allegations that the Council arbitrarily and discriminatorily refused to seek to remedy Carter's discharge and that the Council is incapable of fairly representing plaintiff, the complaint alleges no facts to support these conclusions. Rather the allegations of the complaint and the affidavits disclose that Carter himself failed even to grieve his discharge, told his union he did not wish to contest his discharge, and sought only pension and insurance benefits. Vague allegations that Carter asked Council President Colella to act on his "case" on "his behalf," or in pursuit of his "interests," appear both in the complaint and Carter's affidavit in opposition to the motion to stay. These cannot overcome the specific denials in affidavits of Council President Colella and Treasurer Mensch that no grievance was filed by Carter protesting his discharge and that Carter told Collella he did not wish to contest his discharge. Moreover, Carter's inadequate allegation, repeated in his affidavit, that he called Colella's attention to the arbitration provisions of the contract, does not meet the specific statements of Colella and Mensch that Carter never requested that the Council arbitrate his discharge, consistent with their statements that he did not grieve it.

Thus, Carter's lack of diligence makes it unnecessary

to reach Carter's contention that the Council did not or could not fairly represent him. But even if reached, these charges are baseless. Although a conflict between Carter's interests and Colella's interests is alleged to arise from Carter's appearance before a Grand Jury in Puerto Rico, which subsequently indicted Colella and three other IUE employees, there is no allegation that Carter testified against any of them or is to be a witness against them at any subsequent trial. To the contrary, in a letter to Colella, Carter stated that this was not the case. Moreover, assuming Carter and Colella had a personal conflict, the complaint alleges nothing which would give rise to a conflict between Carter and the Council or its other officers. Carter's own conduct in dealing by choice only with Colella and not with his own grievance representative, never seeking to have the Council excuse Colella from his "case", never presenting his "case" to other officers or the Executive Board or its membership, and never complaining to anyone about the representation he had received prior to the filing of his suit, clearly reveal that the alleged deficiencies in Carter's representation by the Council are afterthoughts, void of substance, and were brought forward only when the complaint was filed.

In sum, Carter, an experienced professional union representative, cannot excuse his failure to exhaust the contractual grievance and arbitration procedures when he repeatedly failed to take any steps to protect the interests which he would now place in issue in this action.

IV. While courts have sometime dismissed damage actions for failure to exhaust contractual grievance and arbitration procedures, in the absence of dismissal, a stay is appropriate. *Drake Bakeries* v. *Local 50, Bakery Workers*, 370 U.S. 254 (1962). A stay pending exhaustion of contractual procedures is in conformity with federal

policy, and will not prejudice Carter. On the other hand, denial of a stay would deprive IUE of its contractual rights to resolve any dispute over Carter's discharge through contractual procedures and would be contrary to federal policy which encourages the settlement of disputes through agreed upon means.

ARGUMENT

I. Appellee Was Required to Exhaust His Contractual Remedies as a Prerequisite to Suit

This case is governed by the developing body of federal law established pursuant to Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. §185(a), *supra*. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962); *Smith* v. *Evening News Association*, 371 U.S. 195 (1962); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Belk* v. *Allied Aviation Service Co.*, 315 F. 2d 513 (C.A. 2, 1963), cert. den. 375 U.S. 874.[3]

While the authorities are not uniform, the prevailing view is that in actions to recover damages for wrongful discharge

> "if . . . there is grievance arbitration procedure provided for, there should be recourse to it before the individual employee is permitted to bring a court action."

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[3] In *Smith v. Evening News Association*, 371 U.S. 195, the Court discarded the distinction previously drawn between actions to enforce "uniquely personal" rights and actions to enforce contract rights of general application, and held that *Association of Westinghouse Salaried Employees v. Westinghouse Corp.*, 348 U.S. 437, "is no longer authoritative as precedent." 371 U.S., at 199. *Smith* held that an action by individual employees in a state court to collect wages in the form of damages for wrongful discharge arises under §301. There was no grievance arbitration procedure in the collective bargaining agreement on which the action was based. 371 U.S., at 196, n. 1.

Belk v. *Allied Aviation Service Co., supra,* 315 F. 2d, at 515 and 516, n. 3; *Ostrofsky* v. *United Steelworkers,* 171 F. Supp. 782 (1959), aff'd. 273 F. 2d 614 (C.A. 4), cert. den. 363 U.S. 849 (1960); *Anson* v. *Hiram Walker & Sons,* 248 F. 2d 380 (C.A. 7, 1957); *Parker* v. *Borock,* 5 N.Y. 2d 156, 182 N.Y.S. 2d 577, 156 N.E. 2d 297 (1959); *Jenkins* v. *Schluderberg-Kurdle Co.,* 217 Md. 556, 144 A. 2d 88, (1958); *Donnelly* v. *United Fruit Co.,* 40 N.J. 61, 190 A. 2d 825 (1963); *Smith* v. *General Electric Co.,* 63 Wash. 2d 627, 388 P. 2d 550 (1964); *Rowan* v. *McKee,* 262 Minn. 375, 114 N.W. 2d 692 (1962); *Webster* v. *Midland Electric Coal Corp.,* 43 Ill. App. 2d 359; 193 N.E. 2d 212 (1963), cert. den. 377 U.S. 964 (1964); *Cortez* v. *Ford Motor Co.,* 349 Mich. 108, 84 N.W. 2d 523, 525 (1957); *Falsetti* v. *Local 2026, UMW,* 400 Pa. 145, 161 A. 2d 882 (1960).[4] While this question does not appear to have been squarely presented in this Circuit, its views are in accord. *Minor* v. *Washington Terminal Co.,* 86 U.S. App. D.C. 71, 180 F. 2d 10 (1950).[5]

Underlying these decisions and expressly adopted in them is the principle that plaintiff cannot select portions

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[4] In *Republic Steel Corporation* v. *Maddox,* 275 Ala. 685, 158 So. 2d 492 (1963) the Alabama Supreme Court decided to the contrary, applying state law, relying on *Springer* v. *Powder Power Tool Co.,* 220 Ore. 102, 348 P. 2d. 1112, which appears to be overruled by the later Supreme Court decision in *Dowd Box Co.* v. *Courtney, supra,* and upon cases decided under the Railway Labor Act, which are excluded from §301 and inapplicable. See *Larsen* v. *American Airlines,* 313 F. 2d 599 (C.A. 2, 1963). Certiorari has been granted in the *Republic Steel case,* 377 U.S. 904 (1964). Likewise the decision in *Woodward Iron Co.* v. *Ware,* 261 F. 2d 138, (C.A. 5, 1958) applied Alabama law, based among other things, upon an attitude of hostility to arbitration agreements. 261 F. 2d, at 142, n. 3.

[5] The precise issue in that case was whether a material issue of fact existed as to failure of defendant to give plaintiffs a copy of an agreement as required by its terms. The factual issue was raised in response to a defense of failure to exhaust remedies. If exhaustion of remedies was not required, then it would have been immaterial whether the copies of the agreement were supplied.

of an agreement on which to base his claim and ignore other provisions.[6] This view is consonant with the federal policy of encouraging peaceful settlement of disputes arising under collective bargaining agreements through grievance and arbitration procedures.

Here the agreement provided a grievance procedure to be followed in the event of "Any dispute, disagreement, problem or grievance that may arise . . . between IUE and a field representative concerning the field representative's employment relationship" (J.A. 7). In the event that a grievance is not satisfactorily resolved in the three step procedure, either the Council or IUE had the right to take the grievance to arbitration[7] (J.A. 8). By its terms, a claim of unjust discharge in violation of Article V, Section 3 of the agreement gives rise to a grievance for resolution through this procedure (J.A. 7).

It is beyond dispute that the contractual remedies were

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[6] The grievance and arbitration procedure is more than a *quid pro quo* for no-strike provisions in an agreement. *Drake Bakeries v. Bakery Workers*, 370 U.S. 254 (1962), at 261, n. 7. Indeed, here there is no no-strike provision in the agreement. The readiness of an employer to agree to provisions providing that discharge shall not be without just cause may well be affected by his assurance that disputes over discharges will not be subject to court action but will be handled through the grievance arbitration procedure and committed to arbitrators familiar with mores and customs surrounding the particular employment relationship. See *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Ostrofsky v. United Steelworkers, supra*, 171 F. Supp. 782, 790; *Local 12405 UMW v. Martin Marietta Corp.*, 328 F. 2d 945 (C.A. 7, 1964).

[7] While the contract provides that either party "may" take the grievance to arbitration, the fact that either party has discretion not to carry the grievance further does not alter the exclusive nature of the grievance and arbitration procedure as a means of settling disputes arising under the contract. Such a provision requires exhaustion of remedies. *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 257 n. 2 (1962); *Belk v. Allied Aviation Service Co., supra.*, 315 F. 2d at 515; *Galley v. Pennsylvania R. Co.*, 220 F. Supp. 190 (S.D. N.Y., 1963), affirmed 324 F. 2d 502 (C.A. 2, 1963).

not exhausted in this case. Accordingly, unless Carter can demonstrate cause for an exception to the requirement of exhaustion of contraction remedies, the action must be stayed. See IV, pp. 23-24, *infra*.

II. Failure to Exhaust the Grievance Arbitration Procedure Cannot Be Excused

Assuming *arguendo*, that Carter grieved his discharge and requested that the Council seek arbitration, taking the allegation that the Council did not fairly represent him most favorably to Carter, an exception to the rule requiring exhaustion of remedies is not warranted to permit a direct damage action against the IUE bypassing the grievance and arbitration provisions of the contract.

There are relatively few recent cases decided under Section 301(a) or in the light of federal policy in which the question of the remedy available to an employee when he is not given fair representation has been explored.[8] However, despite a divergency of views as to the remedy available to an employee in these circumstances, none would support this damage action. The New York and Pennsylvania courts conclude that the employee must look to his union for his remedy, and that the deficiency of the bargaining representative does not free the employee to deprive the employer of the benefits of the grievance arbitration provisions of the collective bargaining agreement. *Parker* v. *Borock*, 5 N.Y. 2d 156, 182 N.Y.S. 2d 577, 156 N.E. 2d 297 (1959); *Donato* v. *American Locomotive Co.*, 283 App. Div. 410, 127 N.Y.S. 2d 709, aff'd. 306 N.Y. 966, 120 N.E. 2d 227 (1954); *Falsetti* v. *Local 2026, UMW*, 400 Pa. 145, 168-173, 161 A. 2d 882 (1960). See also *Cortez* v. *Ford*

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[8] In *Belk* v. *Allied Aviation Service Co.*, *supra*, the Court left this issue to future cases as they arise.

Motor Co., 349 Mich. 108, 84 NW 2d 523. The New Jersey courts agree that a direct damage action against the employer will not lie, but are of the view that absent fair representation, the employee may take up the grievance with the employer to and including arbitration, and may sue the employer only if it should then refuse to abide by the contractual procedure. *Donnelly* v. *United Fruit Co.*, 40 N.J. 61, 190 A. 2d 825, 840-843 (1963). This view is suggested as one of two alternatives by Professor Cox in *Rights Under A Labor Agreement*, 69 Harvard Law Review, 601, 647-652 (1956).[9]

The third view follows the other alternative suggested by Professor Cox and was adopted by the Maryland courts in *Jenkins* v. *Schluderberg-Kurdle Co.*,[10] 217 Md. 556, 144 A. 2d 88 (1958). That view is based on an analogy between the role of the union as exclusive bargaining representative in the administration of a collective bargaining agreement and that of a trustee.[11] The failure of a trustee to sue to protect trust property gives rise to an action by the beneficiary in equity to compel him to perform his duty to protect the trust property. To avoid multiplicity of actions the third person against whom the rights of the trust are to be enforced may be joined as a codefendant.[12] If it develops that the trustee did not breach his trust in failing or refusing to bring action against the third person, or if

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[9] See also Summers, *Individual Rights and Arbitration*, 37 NYU Law Review, 362, 399-405 (19—).

[10] Followed in *Ostrofsky v. United Steelworkers, supra; Jones v. International Union of Operating Engineers*, 72 N.M. 322, 383 P. 2d. 571.

[11] As the Court of Appeals for the Second Circuit noted in *Belk v. Allied Aviation Service Co., supra*, 315 F. 2d at 516, none of the analogies which have been advanced to aid in the analysis of the relationships created by collective bargaining agreements are completely satisfactory, and they are to a large degree *sui generis*.

[12] III Scott on Trusts §282.1. (Little, Brown & Company, 1956).

it was prudent under the circumstances for the trustee to have refrained from so doing,[13] the trustee did not violate his duty, and the beneficiaries can neither compel him to bring action against the third person nor themselves maintain a suit in equity against the third person.[14]

Such an action is not designed to permit the beneficiary to gain for himself directly what he could not gain absent a breach of trust. Rather it permits him to enforce the duty of the trustee created by the trust.

Assuming the validity of this approach to the enforcement of rights arising under a collective bargaining agreement, a stay pending exhaustion of contractual procedures, which was not before the Maryland Court, would remain appropriate with respect to any attempt by an employee to stand in the shoes of the bargaining representative. Assuming the unwillingness of the representative to proceed with arbitration, an order directing the bargaining representative to perform its obligation to arbitrate with appropriate safeguards to the employee's interests would achieve the purpose of protecting the employee's interest without depriving the employer of the contractual procedures for which he bargained.

It is unnecessary to decide in this case which of these approaches constitutes the federal law, for plaintiff is not helped by any of them in his opposition to a stay of these proceedings.

As this action is brought against Carter's employer and not against his union, clearly under the views of the New York and Pennsylvania courts, he cannot bypass his

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[13] To a greater extent than a trustee, a collective bargaining representative may exercise considerable discretion with respect to the administration and enforcement of a collective bargaining agreement. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Humphrey v. Moore*, 375 U.S. 335, 349-350. See *Belk v. Allied Aviation Service Co., supra*, 315 F. 2d, at 516, n. 4.

[14] III Scott on Trusts §282.1.

failure to exhaust contractual remedies. As Carter alleges no effort to prosecute his alleged grievance over his discharge on his own behalf, under the view taken by the New Jersey courts, the failure to exhaust contractual remedies similarly cannot be avoided.[15] Finally, under the trust analogy, which puts Carter in the shoes of his union, he may avoid the grievance and arbitration procedure of the contract no more than could his union,[16] and a direct damage action by his union would be subject to either dismissal or stay. (See Section IV, *infra.*) [17]

III. The Complaint and Affidavits in Any Event Provide No Basis for Excusing Failure to Exhaust Contractual Procedures.

The complaint alleges that the Council "arbitrarily and discriminatorily" refused to seek to remedy Carter's discharge and that the Council "is incapable of fairly representing plaintiff's interests in view of the personal interest of its President Colella in the reasons for plaintiff's dis-

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[15] See *Donnelly v. United Fruit Co., Supra*, 40 N.J. 61, at 93-94, 96.

[16] See III Scott on Trusts §327.7, dealing with the effect of statutes of limitations. A trustee can properly submit claims to arbitration. II Scott on Trusts §192.

[17] There is substantial reason to believe that a fourth view may be correct. The duty of fair representation which Carter alleges was breached by the Council is created by Section 9 of the National Labor Relations Act, as amended, *supra*, 29 USC §159. As the Board has recently held, breach of that duty constitutes an unfair labor practice, and the Board's jurisdiction may be exclusive over this aspect of Carter's claim. *Hughes Tool Co.*, 147 NLRB No. 166. *Miranda Fuel Co., Inc.*, 140 NLRB 181, enf. den. 326 F. 2d 172 (C.A. 2). *United Association of Journeymen, etc. v. Borden*, 373 U.S. 699 (1963); *Iron Workers v. Perko*, 373 U.S. 701 (1963). Cf. *Humphrey v. Moore, supra, Smith v. Evening News Association, supra.* In *Smith v. Evening News*, the unfair labor practice and the breach of contract were identical. See concurring and dissenting opinion of Mr. Justice Harlan in *Humphrey v. Moore*, 375 U.S. 360. The Board's remedial powers would include the power to make Carter whole for any loss he may have suffered. It is not necessary to reach this question here.

charge" (J.A. 4). These conclusionary pleadings of themselves are insufficient to sustain the complaint and add nothing to factual allegations in the complaint from which it is plaintiff's hope these conclusions may be drawn.[18] These allegations must be judged rather on the bases of factual allegations in the complaints and the affidavits which relate to them.

The complaint alleges that while assigned to Puerto Rico by defendant, the United States Department of Justice investigated certain financial dealings of Colella, who had previously been assigned to Puerto Rico and was president of the Council, and of Andrew Barral and other IUE personnel in Puerto Rico. In the course of the investigation, plaintiff alleges he was subpoenaed to testify before a grand jury and did so (J.A. 2). Subsequently indictments were returned against Barral and two other individuals for conspiracy to embezzle labor organization funds and embezzlement of such funds. An indictment was returned against Colella for embezzlement of Union funds. All indictments are pending trial. (J.A. 2-3).

The complaint alleges that Barral and Colella "were and are aligned with defendant Carey in matters of internal politics of IUE." (J.A. 3).

The complaint alleges that shortly after his termination, Carter telegraphed Council President Colella, "Was terminated September 13. Contact President Carey re my case"; and several days thereafter spoke to Colella, informing him that plaintiff "had been unjustly discharged and that he expected the Council to proceed on his behalf." The complaint alleges that Colella stated that "since the

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[18] *Marranzano v. Riggs National Bank of Washington*, 87 U.S. App. D.C. 195, 184 F. 2d 349 (1950); *Anson v. Hiram Walker & Sons*, 222 F. 2d 100, 104 (C.A. 7, 1955), cert. den. 350 U.S. 840. *Ostrofsky v. United Steelworkers, supra*, 171 F. Supp., at 793-794; See *Jenkins v. Schluderberg-Kurdle, supra*, 217 Md., at 562.

discharge was not justifiable, the Council would proceed on plaintiff's behalf." Subsequently, plaintiff met with Colella who stated that "Council's officers had met with IUE President Carey" but had been unable to advance plaintiff's interests in any manner." The complaint alleges that Colella stated his opinion that Carey would discharge Colella if he pursued "the matter of plaintiff's discharge or pension rights any further." Plaintiff next alleges that he "brought to President Colella's attention the arbitration provisions of the collective bargaining agreement, but the Council did not seek arbitration in plaintiff's case." (J.A. 3-4).

The complaint on its face is thus defective under any view of the law relating to exhaustion of contractual remedies, for it does not allege that Carter ever grieved his discharge, it does not allege that Carter ever asked the Council to grieve or arbitrate his discharge, and it alleges no basis for concluding that the Council was incapable of fairly representing him. The defects become even more glaring in the light of the affidavits filed in support of and in opposition to the motion to stay.[19]

Carter did not grieve his discharge. Despite the clear provisions in the agreement for handling of grievances "By the affected field representative and/or his Committeeman," there is no allegation that Carter grieved his discharge either formally or informally, or that he requested his Committeeman to do so. Carter instead chose to deal directly with President Colella. But the nature of his requests to Colella is vaguely alleged in the complaint. The

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[19] We believe that the amended complaint and the affidavits clearly demonstrate the inadequacy of the asserted basis for avoiding contractual procedures. Inasmuch as the motion to stay was a request for injunctive relief, consideration of the affidavits and a preliminary hearing, if necessary, upon factual issues raised in connection with the motion is appropriate. Rule 65, Federal Rules of Civil Procedure. Compare *Falsetti v. Local 2026, UMW,* 400 Pa., at 165, n. 16.

complaint pointedly omits any allegation that Carter requested the Council or its officers to seek rescission of his discharge. Instead he alleges that he requested Colella to intercede "re my case", that he told Colella several days later "he expected the Council to proceed on his behalf," and that Colella informed him he "had been unable to advance plaintiff's interest in any manner." Carefully and deliberately the complaint avoids any reference to the purpose for which Colella was requested to contact Carey or what Carter meant by proceeding "on his behalf". (J.A. 3-4).[20]

Any lingering doubt as to the inadequacy of the complaint in this regard is resolved by the affidavits submitted by both parties in connection with the motion to stay. Plaintiff's affidavit is as deliberately worded as his complaint to avoid identifying the nature of any grievance which Carter requested Colella to press. The telegram, which the complaint quotes verbatim, is paraphrased to read as a request "to process a grievance on my behalf", but even then the nature of the grievance is not identified.[21] The deficiency is even more glaring when his affidavit is read as a *response* to the affidavits of Colella and Mensch filed in support of the motion to stay.

Apart from the conflict between Carter's affidavit and the affidavits of Colella and Mensch as to whether Carter did or did not take the position that his discharge was unjust in conversation with Colella on September 20, 1963, Colella states affirmatively that Carter said he was not contesting his discharge because he was interested in re-

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[20] Allegation of undefined "complaints or requests" are not equivalent to invoking provisions for settlement of grievances. *Anson v. Hiram Walker & Sons*, *supra*, 222 F. 2d at 104.

[21] The paraphrase of course adds nothing to the text previously quoted in the complaint. In describing his conversation with Colella of September 20, 1963, Carter in his affidavit again states generally that he requested the Council "to grieve my case." (J.A. 21).

tiring because of his health (J.A. 12). Colella quotes from Carter's October 8 letter that Carter wished to contact Colella "with regards to my accumulated pension, insurance and other rights and benefits accrued by me during my employment with the Union," (J.A. 12-13, 15-16). Colella states that by letter of October 18, 1963, he conveyed to Carter his understanding that Carter's interest related to receiving pension and insurance benefits upon reaching age 62 (J.A. 13). Colella states further that following this he and the officers of the Council met with President Carey of the IUE, to discuss a number of matters of business between IUE and the Council, in the course of which they conveyed their understanding of Carter's position, indicating specifically that Carter had not grieved concerning his discharge, but was interested in a pension upon reaching age 62 (J.A. 13). On or about November 18, 1963, Colella states he reported to Carter the inconclusive results of this conversation (J.A. 13). The affidavit of Mensch, who is Treasurer of the Council, confirms Colella's affidavit as to the nature of the discussions between the Council and Carey and that Carter never filed a grievance with the Council (J.A. 19-20).

Comparison of Carter's affidavit with the verified complaint on the one hand and the affidavits to which it purports to respond on the other, leaves no doubt that Carter at most sought pension and insurance benefits, and that both Carter and Colella understood that this was the extent of his "case" or "interest" for which the Council was to proceed "on his behalf". The failure of Carter's affidavit to identify the nature of "his case" or take issue with the affidavit of Colella which is specific, concedes the accuracy of Colella's affidavit (J.A. 21-23).[22]

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[22] Carter's backhanded attempt to inject a contest of this discharge in his discussions with Colella by his reference to Colella's October 18, 1963, letter can hardly succeed. Carter states that in it Collella "ignored the

Under these circumstances, it is not even necessary to consider how he was represented by the Council or whether it could fairly represent him, for it was his own deficiency and not any deficiency of the Council which bars him from avoiding the contractual procedures. *Cortez* v. *Ford Motor Co., supra*, 349 Mich. 108, at 126-127; *Smith* v. *General Electric Co., supra*, 63 Wash. 2d, at 628. See *Anson* v. *Hiram Walker & Sons, supra*, 222 F. 2d, at 104; *Donnelly* v. *United Fruit Co., supra*, 40 N.J. 93-94, 96.

Even assuming that Carter's failure to grieve his discharge may be somehow circumvented, his failure to ask the Council to seek arbitration of his discharge is even more pointed. With respect to arbitration the complaint alleges only "Plaintiff brought to President Colella's attention the arbitration provisions of the collective bargaining agreement, but the Council did not seek arbitration in plaintiff's case."[23] (J.A. 3-4). Apparently the statement of the Council's failure to act is intended to imply that the clause which precedes it carried with it a request for arbitration, despite its curious wording. To draw such an inference is of course an abuse of logic, and the complaint as it stands avoids any allegation that Carter asked the

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fact that I had stated that I was contesting my discharge." (J.A. 22). Not only does Carter never state that he had previously told Colella this, but he fails to allege that he made any effort to correct what he would now contend was Colella's wrong impression. Instead he skips over the intervening two months by avering that he was not able to "see" Colella again until December 10, 1963 (J.A. 22). In so doing, he concedes the accuracy of Colella's statement that the results of the November 4 discussion between the Council officers and Carey were reported to Carter by telephone on November 18, 1963, and by his silence admits that apart from the obvious availability of the mails to correct any wrong impression Colella may have entertained, Carter failed to do so in direct telephone conversation. Carter also ignores his own letter of February 5, 1964, which likewise failed to correct Colella if he was in error (J. A. 16-17), to which Colella responded on February 26 (J. A. 18).

[23] Again neither the complaint nor the affidavit relates arbitration to any specific subject matter.

Council to arbitrate his case. But any ambiguity is dispelled by the affidavits. Colella, with whom Carter by choice had all his dealings, and Mensch are direct and to the point. Carter never requested the Council to take his case to arbitration (J.A. 14, 20). Carter's affidavit in response merely repeats the litany of the complaint "I called the arbitration provision in the contract to his attention." (J.A. 22). Even if the curious wording of the complaint can be viewed as inartful in the absence of the affidavit, the repetition of the claim that Carter merely "called the arbitration provision in the contract to [Colella's] attention" in the face of the denials of Colella and Mensch that arbitration was requested, concedes that it was not requested.

Accordingly, it is clear that for purposes of the motion to stay, the record establishes that Carter failed to initiate contractual procedures to protest his discharge, that he failed to ask the Council to exhaust the procedures, and of course, that the procedures were neither followed nor exhausted. It is therefore unnecessary to decide what Carter's rights would be, if he had been diligent in pursuit of the contract rights he now seeks to assert and to reach the question of the quality of the Council's representation or its capacity to represent him. *Smith* v. *General Electric Co., supra; Donnelly* v. *United Fruit Co., supra, Cortez* v. *Ford Motor Co., supra.*

Apart from its conclusionary allegations, the complaint alleges no basis for its charge that the Council did not and could not fairly represent Carter.

The complaint does not allege that Carter testified against Colella or any other IUE representative before the Grand Jury or that he was to be a witness against them at any subsequent trial.[24] Certainly Carter's mere appearance before

[24] Carter stated that he gave no testimony adverse to Colella, Barral or anyone else in his February 5, 1964, letter to Colella. (J. A. 17).

the Grand Jury pursuant to subpoena does not give rise to a conflict of interest between Carter and Colella.[25] Moreover, assuming that Carter and Colella had conflicting interests, the complaint alleges nothing which would give rise to a conflict between Carter and the Council, its other officers, Executive Board members, or membership in general. Carter's own conduct demonstrates that the allegation that the Council is incapable of representing him fairly is an afterthought brought forward only when the complaint was filed.

From the complaint itself it appears that Carter by choice dealt at all times directly with Council President Colella, the man whose interests he now claims were in conflict with his. Carter never sought assistance from his own committeeman or any other Council representative. Yet Colella's conflicting interest, if Carter believed one existed, predated Carter's grievance and was known to Carter. Having chosen to deal with Colella, Carter fails to allege any effort by him to seek Colella's removal from any contact with Carter's "case", or even when he was dissatisfied with the outcome, to seek reconsideration from the Council executive board or membership. Instead Carter merely "brought to President Colella's attention the arbitration provisions" of the Agreement and let it go at that.

If there remains any doubt from the complaint, the affidavits reveal that Carter never viewed his representation as inadequate until his complaint was filed. Colella and Mensch's affidavits set out the actions taken by the Council in Carter's behalf even in the absence of a grievance.[26]

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[25] Nor does the vague, conclusionary, and completely meaningless allegation that Barral and Carter were "aligned with defendant Carey in matters of internal politics of IUE."

[26] The actions taken by the Council officers were well within the range of direction allowed them, particularly in the light of Carter's conduct. See cases at n. 13, *supra*.

They aver that Carter never complained that he was unfairly represented or that Colella had a personal interest in Carter's discharge. They state that Carter never submitted any criticism to the officers or Executive Board of the Council nor did he seek reconsideration of their actions. Carter's answering affidavit does not contradict them.[27]

At the very least before bypassing the grievance and arbitration procedure, Carter was obliged to give some inkling of his belief that he was not or could not be satisfactorily represented by the Council. Instead, he remained silent and dealt only with Colella.

In sum, even an uninformed rank-and-file industrial employee would be expected to make a greater effort to protect his interests before being permitted to avoid contractual grievance and arbitration provisions.[28] Carter who was employed as a professional field representative by a union who claimed 14 years "competent, satisfactory and loyal" service in that capacity (J.A. 2), can hardly be held to a lesser standard.

IV. The Stay Pending Exhaustion of Contractual Remedies Should Have Been Granted

While courts have sometimes dismissed damage actions based on collective bargaining agreements with grievance and arbitration provisions for failure to exhaust contractual

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[27] Carter, in his affidavit in opposition, confirms that he dealt only with Colella. In the apparent attempt to avert the consequences of his failure to take any action for his own protection, he alleges that Colella told him the other officers were too frightened to talk to him and that he was told by an unidentified source that the members of the union were generally stirred up against him (J.A. 22). But Carter by his silence concedes that he made no effort to talk with the other officers or deal with anyone alse. Colella in his affidavit denied that any member of the Council's committee was threatened with reprisal by IUE President Carey (J.A. 14). We do not believe this conflict in affidavits need be resolved, but if so a hearing would be required.

[28] *Smith v. General Electric Co., supra,* 63 Wash. 2d, at 629.

remedies, and Appellants so moved in the alternative,[29] in the absence of a dismissal a stay is clearly appropriate. *Drake Bakeries* v. *Local 50, Bakery Workers*, 370 U.S. 254 (1962); *Swartz & Funston, Inc.* v. *Bricklayers, Local 7*, 319 F. 2d 116 (C.A. 3, 1963), *Gilmour* v. *Lathers Local 74*, 223 F. Supp. 236, 244 (N.D. Ill., 1963).[30] Although the Arbitration Act may not apply directly to this proceeding, it provides a clear indication of Federal policy from which the courts may draw and confirms the appropriateness of this disposition. Act of July 30, 1947, c. 392, § 1, 61 Stat. 669, 9 USC § 3.

If this action is not stayed, appellants will be deprived of their contractual rights to have grievances settled through the contractual grievance and arbitration procedure, contrary to federal policy of encouraging settlement of labor disputes through agreed upon means. See cases cited in note 6, *supra*. At the same time, if the action is stayed, Carter will not be prejudiced by insisting that he pursue his contractual rights by the agreed upon means. Accordingly, as the complaint and affidavit demonstrate no basis for avoiding the contractual procedures, the motion to stay should have been granted.

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[29] See e.g. *Jefferson City Cabinet Co. v. IUE*, 313 F. 2d. 231, (C.A. 6, 1963), cert. den. 373 U.S. 936; *Belk v. Allied Aviation Service Co., supra.*

[30] In the *Swartz & Funston* and *Gilmour* cases, stay was preferred to dismissal because of the possibility that judicial action might be appropriate after contractual procedures were exhausted.

CONCLUSION

For the reasons set forth above, the order of the District Court should be vacated and an order staying further proceedings pending exhaustion of contractual remedies should be entered in its place.

Respectfully submitted,

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
Attorneys for Appellants.

August 15, 1964.

INDEX TO JOINT APPENDIX

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

April	30	Amended complaint; c/m April 30, 1964; jury demand; Exhibit A. filed
May	15	Motion of defendants to dismiss or in the alternative to stay and motion to strike, c/s May 15, 1964; affidavit; exhibit; P & A; MC May 15, 1964. filed
May	22	Opposition of plaintiff to motion to dismiss and opposition to motion to stay, c/m May 22, 1964. filed
June	22	Order denying motion to dismiss amended complaint as to defendants; denying motion to strike allegations from the complaint; and denying alternative motion to stay proceedings pending exhaustion of plaintiff's contractual remedies. Holtzoff, J. (N)
June	26	Notice of Appeal by defendants from order of June 22, 1964. Copy mailed to H. Witt. $5.00 deposit by Sigal. filed
June	30	Order authorizing transmittal of the record to the U.S. Court of Appeals for District of Columbia. (N) Holtzoff, J.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. C.A. 608-64

W. RICHARD CARTER, 90 Hough Avenue, Bridgeport 8, Connecticut, *Plaintiff*,

v.

JAMES B. CAREY, 1126 Sixteenth Street, N.W., Washington 6, D.C.,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, 1126 Sixteenth Street, N.W., Washington 6, D.C., *Defendants*.

AMENDED COMPLAINT

(Wrongful Discharge—Breach of Contract and Tort)

Now comes plaintiff and for his cause of action against defendants alleges as follows:

1. This Court has jurisdiction by virtue of D.C. Code (1961 ed., as amended) § 11-521, and 29 U.S.C. § 185. The amount of plaintiff's claim exceeds $10,000, exclusive of interest and costs.

2. Plaintiff, W. Richard Carter, is a resident and citizen of the State of Connecticut and of the United States.

3. Defendant International Union of Electrical, Radio and Machine Workers (hereinafter referred to as "IUE") is an unincorporated labor organization with its offices at 1126 Sixteenth Street, N.W., Washington 6, D.C.

4. Defendant James B. Carey is the President of IUE, and has offices at 1126 Sixteenth Street, N.W., Washington 6, D.C.

5. The Council of Industrial Organizers (hereinafter referred to as the "Council") is an unincorporated labor

organization, representing, as exclusive bargaining agent, certain employees of IUE known as Field Representatives. The officers of the Council are Angelo Colella, President, and Fred Mensch, Treasurer. In September 1963, Robert Klingensmith was its Secretary.

First Count

6. On or about April 30, 1963, defendant IUE and the Council entered into a collective bargaining agreement, a true copy of which is attached hereto as Exhibit A and incorporated by reference herein. Plaintiff was then and until his discharge by defendant IUE an employee in the unit covered by this agreement.

7. The collective bargaining agreement between defendant IUE and the Council provides, in Article V, Section 3, that field representatives who have completed their six months probationary period "shall be discharged only for just cause."

8. As of September 13, 1963, plaintiff had been continuously employed by defendant IUE since 1949, and during this 14-year period, plaintiff had performed his duties in a competent, satisfactory, and loyal manner.

9. On or about June 1, 1961, plaintiff was assigned to work in the Puerto Rico office of defendant IUE as field representative in charge of that office. His predecessor in that capacity was Andrew Barral. Angelo Colella, President of the Council, had also been assigned earlier to the Puerto Rico office.

10. While plaintiff was assigned to the Puerto Rico office, the United States Department of Justice carried out an investigation of certain financial dealings of Andrew Barral, Angelo Colella, and other IUE staff personnel. During the course of said investigation, in the latter part of the year 1962 or the early part of the year 1963, a grand jury was convened in the United States District Court for the District of Puerto Rico. Plaintiff was subpoenaed to appear and testify before said grand jury, and he did so in response to the subpoena.

11. On February 19, 1963, said grand jury returned an indictment against Andrew Barral and two other individ-

uals, charging them with violations of 18 U.S.C. § 371 (conspiracy to embezzle funds of a labor organization) and 29 U.S.C. § 501 (c) (embezzling, stealing, abstracting and converting funds of a labor organization). On February 20, 1963, said grand jury returned an indictment against Angelo Colella, charging him with violations of 29 U.S.C. § 501 (c). All of said indictments are pending in the United States District Court for the District of Puerto Rico.

12. Andrew Barral and Angelo Colella were and are aligned with defendant Carey in matters of internal politics of IUE.

13. On or about September 13, 1963, defendant IUE, at the instance of defendant Carey, discharged plaintiff from his employment. Said discharge was without just cause, and was solely the result of plaintiff's testimony before the aforesaid grand jury and his alleged "cooperation" with the Department of Justice, and constituted an attempt to prevent him from testifying at the trials of Barral and Colella. Said discharge was wrongful and unlawful, a violation of Federal law forbidding the intimidation of witnesses, and in violation of plaintiff's rights under the aforesaid collective bargaining agreement, and of plaintiff's rights under his employment contract.

14. On September 17, 1963, plaintiff telegrammed Council President Colella as follows: "Was terminated September 13. Contact President Carey re my case." Several days later, plaintiff talked to President Colella, and informed him that he had been unjustly discharged and that he expected the Council to proceed on his behalf. At that time, President Colella stated that since plaintiff's discharge was not justifiable, the Council would proceed on plaintiff's behalf. Thereafter, plaintiff met with President Colella, who stated to plaintiff that the Council's officers had met with defendant Carey but had been unable to advance plaintiff's interests in any manner. During this conversation, President Colella stated that he was of the opinion that the defendant Carey would discharge him, Colella, should he pursue the matter of plaintiff's discharge or pension rights any further. Plaintiff brought to President Colella's attention the arbitration provisions of the collec-

tive bargaining agreement, but the Council did not seek arbitration in plaintiff's case. Thus, plaintiff invoked the Council's efforts on his behalf, and the Council arbitrarily and discriminatorily refused to seek to remedy plaintiff's discharge in the manner that the collective bargaining agreement specified.

15. The Council is incapable of fairly representing plaintiff's interests in view of the personal interest of its President Colella in the reasons for plaintiff's discharge. Grievance proceedings and arbitration under the control of the Council as plaintiff's representative would be an unfair and inadequate remedy for defendant IUE's breach of the collective bargaining agreement.

16. The aforesaid collective bargaining agreement of April 30, 1963, between IUE and the Council, in Article VIII, provides for the maintenance of a pension plan for the benefit of IUE employees represented by the Council. Under that plan, plaintiff would have been eligible to retire on April 29, 1964, his 62nd birthday, with a pension of $229.79 per month, and for each year thereafter that plaintiff continued to work for IUE the amount of the pension would have been increased. As a result of his discharge, plaintiff has become ineligible to receive any pension from IUE.

17. Since his discharge, plaintiff has made strenuous attempts to secure other employment, all without success.

18. Plaintiff has been damaged by reason of his unjustified discharge by defendant IUE in the amount of $60,000 in lost earnings and pension rights.

Second Count

19. Plaintiff repeats and realleges the matter set forth hereinabove, and it is by reference made a part hereof as fully as if set forth at this point.

20. Defendant Carey wrongfully and maliciously caused plaintiff to be discharged by defendant IUE, for the reasons set forth in paragraph 13 above, in violation of plaintiff's rights under the aforesaid agreement and in violation of Federal law forbidding intimidation of witnesses.

21. Since the time of plaintiff's discharge, defendant

Carey has caused, and is causing, plaintiff to be "blacklisted," so that he has been unable to secure other employment in the trade union movement.

22. The aforesaid actions of defendant Carey constituted wrongful and malicious interference by defendant Carey with plaintiff's employment relationship, resulting in wrongful and intentional injuries to plaintiff, without justification.

23. The aforesaid actions of defendant Carey have caused plaintiff great hardship, damage to his professional reputation, loss of income and pension rights, inability to find other employment, great mental suffering and irreparable damage, all in the amount of $150,000.

WHEREFORE, plaintiff demands judgment against defendants, and each of them, as follows:

1. In the sum of $60,000 for loss of earnings and pension rights;

2. In the additional sum of $150,000 for the great hardship and suffering caused by the wrongful discharge and conduct by defendants in preventing plaintiff from securing other employment;

3. In the further sum of $250,000 as punitive damages for the wrongful and malicious actions of defendants;

4. For the costs of this action; and

5. For such other and further relief as the case may require and as to the Court may seem just and proper.

/s/ W. RICHARD CARTER,
Plaintiff.

DISTRICT OF COLUMBIA, SS:

W. Richard Carter, plaintiff herein, being first duly sworn, deposes and says that he has read the foregoing amended complaint by him subscribed, that he knows the contents thereof, and that the matters and things stated therein are true, to the best of his knowledge and belief.

/s/ W. RICHARD CARTER,
Plaintiff.

Subscribed and sworn to before me this 29th day of April, 1964.

/s/ HELEN NICKERSON,
Notary Public, D.C.

SCUPI AND WITT,
600 F Street, N.W.,
Washington 4, D. C.,
Attorneys for Plaintiff.

By /s/ HAL WITT.

Plaintiff demands trial by jury as to all issues.

/s/ HAL WITT,
Attorney for Plaintiff.

EXHIBIT A

Agreement

Between

International Union of Electrical, Radio and Machine Workers, AFL-CIO

and

Council of Industrial Organizers

May 1, 1963, to April 30, 1965

* * * * *

Article V

Seniority and Assignment Policy

* * * * *

3. Field representatives who have completed their probationary period shall be discharged only for just cause. The Council shall promptly consider any claim that a field representative who has completed his trial period has been unjustly discharged, and may present the matter as a grievance to be settled in accordance with the grievance and arbitration procedures of this Agreement.

* * * * *

Article VII

Representative of Field Representatives

1. Any dispute, disagreement, problem or grievance that may arise between IUE and the Council, or between IUE and a field representative concerning the field representative's employment relationship, shall be handled in the fol-

lowing manner commencing with the Step where the matter in question originated:

a) First Step: By the affected field representative, and/or his Committeeman or Alternate and the designated IUE Official. If requested by either party, a meeting shall take place as soon as reasonably possible. (If the matter is of a general nature, this step of the procedure may be omitted.) If a settlement of the matter is not reached within a week following this discussion, the Council may refer the matter to the next step.

b) Second Step: Efforts shall be made by the designated representative of the IUE President and the Council to settle matters at this step without a meeting. If the Council requests a meeting, a mutually convenient time and place shall be arranged as soon as possible. The Council shall be represented by the Council President and the Committeeman or Alternate representing the field representative involved. If it is deemed necessary the field representative may also be present. Any matter not settled at this step may be referred by the Council to the IUE President.

c) Third Step: Matters at this step shall be discussed between the IUE President and/or such other officers or Executive Board members whom the IUE President may designate, and a committee of the Council consisting of the Council President, the Council Secretary, and the Council Treasurer. Unless the matter involved is of an urgent nature, it shall be discussed at the next quarterly meeting described in Section 4 below.

2. In the event grievances are not satisfactorily resolved at the third step, either IUE or the Council may refer the matter to an impartial arbitrator whom the parties shall select. The arbitrator may rule only on questions affecting interpretation, application, and alleged violations of this Agreement. No disputes arising under Article V, Sections 6, 7, 8 and 9 shall be subject to arbitration. The cost of the arbitrator shall be divided equally between the parties in

cases where the Council has referred the matter to arbitration, and shall be paid entirely by IUE, where it has referred the matter to arbitration.

3. While any grievance is pending, the affected field representative will comply with his instructions unless his personal health or safety, or the health, safety and welfare of his immediate family would be unduly jeopardized by such compliance.

4. A committee consisting of the President, Secretary and Treasurer of the Council, or alternates whom they may designate, shall meet quarterly for one or more days with the IUE President and/or such other officers or Executive Board members whom the IUE President may designate to discuss unresolved problems arising in any District and any other matters of mutual interest.

5. For purposes of representation, the parties agree to the following zones for grievance handling:

a) That portion of IUE District One north of Washington, D. C.;
b) The remainder of District One including the District of Columbia, Virginia and all states south of Virginia in District 1;
c) IUE District 2;
d) IUE District 3;
e) IUE District 4;
f) IUE District 5;
g) IUE District 6;
h) That portion of IUE District 7 included in the states of Ohio, Tennessee and Kentucky;
i) The remainder of the states in IUE District 7;
j) Those states in IUE District 8 which are entirely or primarily east of the Rocky Mountains;
k) The remainder of District 8;
l) IUE District 9;
m) IUE District 10.

In each of these zones, the Council shall have a committeeman and an alternate for the purpose of handling grievances.

6. At all meetings between IUE and the Council, the expenses for the meeting shall be borne by IUE. IUE shall designate the places for the meetings. A field representative involved in a grievance may be brought to the meetings where his presence is reasonably necessary for disposition of the grievance.

* * * * *

IN THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA

Civil Action No. 608-64

W. RICHARD CARTER, *Plaintiff*,

v.

JAMES B. CAREY

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Defendants.*

MOTION TO DISMISS, OR IN THE ALTERNATIVE TO STAY, AND MOTION TO STRIKE

The defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendants, or either of them, upon which relief can be granted.
2. To dismiss the action because the plaintiff has failed to join an indispensable party, namely, the Council of Industrial Organizers.
3. In the alternative, to stay the instant proceedings pending exhaustion of plaintiff's contractual remedies, as set forth in the affidavits attached hereto.
4. To strike the allegations that plaintiff's discharge was "a violation of Federal law forbidding intimidation of witnesses" and "in violation of Federal law for-

bidding intimidation of witnesses", appearing in paragraphs 13 and 20 of the complaint, as immaterial, impertinent, scandalous, and redundant.

/s/ BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
1126 16th Street, N. W.,
Washington 6, D. C.
Attorneys for Defendants.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 608-'64

W. RICHARD CARTER, *Plaintiff,*

v.

JAMES B. CAREY, ET AL., *Defendants.*

AFFIDAVIT

DISTRICT OF COLUMBIA, SS:

Angelo A. Colella, being duly sworn, deposes and says:

I am President of the Council of Industrial Organizers (known as CIO) a voluntary, unincorporated trade union which represents the field representatives of the IUE-AFL-CIO. There is a contract in effect at the present time between the CIO and the IUE concerning wages, hours and other conditions of employment, including a procedure for handling grievances and provisions for arbitration of unresolved grievances.

The administrative structure of the CIO is as follows: There are 3 executive officers, president, secretary and treasurer, elected at large by the members of the union. There is an executive board consisting of the executive officers, District committeemen and 3 trustees. The committeemen are elected by geographical Districts, each Dis-

trict being entitled to one committeeman. The trustees are elected at large.

When any IUE employee represented by CIO has a grievance it is handled by the District Committeemen, or the executive officers of the CIO, or both, in accordance with the provisions of that agreement.

When discussions with IUE officials are concluded at the last step of the grievance procedure, the results of the discussions are reported by the Committee of 3 executive officers to the CIO Executive Board for consideration and action. In an appropriate case, the Executive Board determines whether or not a grievance shall be taken to arbitration.

On or about September 17, 1963, I received a telegram from Richard Carter, the plaintiff herein, which stated as follows:

> "Was terminated Sept. 13. Contact President Carey re my case."

On September 18, 1963, I sent a letter to James B. Carey, President of IUE, requesting information concerning Carter's termination. On or about September 20, 1963, Mr. Richard Carter telephoned me to inform me of the details of his termination, in the course of which he stated that he was not contesting his discharge because he was interested in retiring due to his impaired health. He made no reference in this conversation to whether or not his discharge was unjust. I stated that the Council would discuss the matter with President Carey.

On October 7, 1963, I spoke to President Carey by telephone concerning Mr. Carter's status and the reasons for his discharge. Mr. Carey stated his reasons in general, and suggested that the matter could be discussed more fully in a meeting with the representatives of CIO.

On October 8, 1963, I received a letter from Mr. Carter which stated in part:

> ". . . On several occasions, I have tried to contact you by telephone with regards to my accumulated pension, insurance and other rights and benefits accrued by me

during my employment with the union. As of this date, I have been unable to obtain any information concerning my status in the case or any action taken by you or other representatives of my union . . .

"I am most desirous of clearing my status with the IUE so that any job opportunities which may become available to me can be given serious consideration . . ."

A copy of said letter is attached hereto and made part hereof.

On October 18, 1963, I answered the foregoing letter, and pointed out, among other things, that Mr. Carter had made it clear to me that his interest related to pension benefits and insurance upon his reaching 62 years of age.

On or about November 4, 1963, the officers of CIO, namely, myself, Robert Klingensmith, secretary, and Fred Mensch, treasurer, met with President Carey to discuss a number of matters of business between the CIO and the IUE. During this time we discussed the case of Richard Carter. We requested Mr. Carey to state the reasons for Mr. Carter's termination, although we pointed out that Mr. Carter had not submitted any grievance concerning his discharge, but was interested in a pension as of the time he would reach 62, which would be on April 29, 1964. Mr. Carey stated his reasons for the termination of Mr. Carter at considerable length. The Committee explored with President Carey various possible alternatives, aside from reinstatement of Carter to his job. No conclusions or agreements of any kind were arrived at.

On or about November 18, 1963, I had a telephone conversation with Mr. Carter and reported the results of the discussions between the officers of the Council and President Carey concerning Mr. Carter's case.

On or about December 5, 1963, the CIO officers met with Mr. Carey for their regular quarterly meeting. During this meeting we discussed the Carter matter again. The meeting with Mr. Carey produced no agreement for any change in Mr. Carter's status.

The result of the meetings with Mr. Carey were reported by me to Mr. Carter in person in the afternoon of Decem-

ber 10, 1963. I did not state that it was my opinion that Mr. Carey would discharge me if I pursued the matter of Carter's discharge or pension rights any further. Mr. Carey did not at any time in any manner intimate or express any threat of discharge or other reprisal against myself or any other member of the Committee. At the conclusion of my meeting with Mr. Carter, I suggested that he talk to Mr. Carey himself about this matter. To the best of my knowledge, he did not do so.

On or about the evening of December 5, 1963, the CIO Committee presented to the CIO Executive Board a full report of its discussions with Mr. Carey on Mr. Carter's matter. The Board decided unanimously that no further action by CIO was warranted.

Mr. Carter has never requested the CIO to take his matter to arbitration.

I received a letter from Mr. Carter dated February 5, 1964, in which he purported to review some of the facts in his case and complained about the failure of Mr. Carey to arrange for his receiving a pension. No reference was made in the letter to his reinstatement to his former job. A copy of his letter is attached hereto and made part hereof.

On or about February 26, 1964, I replied to that letter and corrected some of Mr. Carter's misstatements. A copy of his letter is attached hereto and made part hereof.

The officers of the CIO did not arbitrarily and discriminatorily refuse to seek to remedy Plaintiff's discharge in the manner the collective bargaining agreement specified. On the contrary, despite the fact that Mr. Carter failed to submit a grievance contesting his discharge, the officers of the CIO took all measures which were warranted under the circumstances to explore the causes of Mr. Carter's discharge and to seek such benefits for him as were possible. The Council discussed with President Carey the possibilities of a subsequent pension for Mr. Carter, despite the fact that Mr. Carter had never at any time requested the pension which was then available to him under the pension plan in effect for field representatives of IUE.

Neither I as President of the CIO, nor any other officer

of the CIO, have any personal interest in preventing the reemployment of Mr. Carter by IUE. The officers of the CIO have given to Mr. Carter fair and vigorous representation. Never at any time either during the period when CIO was considering Mr. Carter's matter, or at any time thereafter, did Mr. Carter complain that his representation by the CIO was not fair, nor did he ever claim that I as President had a personal interest in the reasons for his discharge. Mr. Carter has never submitted either to the executive officers of the CIO, or to its Executive Board any criticism of the CIO officers who handled the matter, or request reconsideration of the actions of those officers.

The grievance procedure in the agreement between IUE and CIO is a fair, reasonable and effective procedure for the handling of the grievances of the employees represented by CIO, and is completely adequate to handle and remedy any breaches of the collective bargaining agreement between the IUE and CIO.

/s/ Angelo A. Colella.

Sworn to and subscribed before me this 8th day of May 1964.

/s/ Joseph J. Roarty.

My commission expires 4-30-1966.

October 8, 1963

Mr. Angelo Colello
President
Congress of Industrial Organizers
AFL-CIO
Marblehead, Massachusetts

Dear Brother Colello:

I have received the telegram informing you of my discharge and a copy of your letter to Mr. James Carey, President of the IUE, inquiring into the reason for my discharge.

On several occasions, I have tried to contact you by telephone with regards to my accumulated pension, insurance

and other rights and benefits accrued by me during my employment with the union. As of this date, I have been unable to obtain any information concerning my status in the case or of any action taken by you or other representatives of my union. Therefore, I should like to raise the following questions:

1. Is there anyone representing the union in Washington that I may take this, and other matters relating to my case, up with? If so, I would appreciate your advising me of their name and where I may contact them.
2. Do you anticipate being in Washington in the near future? If so, I would appreciate your contacting me in care of Mr. Albert Love; 4202 18th Street, N.W.

I am most desirous of clearing my status with the IUE so that any job opportunities which may become available to me can be given serious consideration. I am sure you can understand the urgency in this matter, even though it is personal.

Fraternally yours,

/s/ William R. Carter,
c/o Mr. Albert Love,
4202 18th Street, N.W.,
Washington 11, D. C.

c/o Mr. Albert Love
4207—18th Street, N. W.
Washington 11, D. C.
February 5, 1964

Mr. Angelo Colella, President
Council of Industrial Organizers
11 Buchanan Road
Marblehead, Mass.

Dear Brother Colella:

As you may have heard, I still have not been able to get another job, and Mr. Carey has been unwilling to arrange for me to receive my pension. I think I will try to talk to Mr. Carey again, for I guess I didn't make myself clear enough to him.

You told me that Mr. Carey was most upset about my having testified before the grand jury and cooperated with the F.B.I. You also told me, last December when we met at the Lafayette Hotel in Washington, that when you, Fred Mensch and Bob Klingensmith met with Carey he was so mad about the Barral case that he frightened Mensch and Klingensmith, and that he refused to talk to me even though you asked him to.

As you know, I didn't say one word to the grand jury which could hurt Barral, you or anybody else. I didn't know anything to tell, because I wasn't in Puerto Rico at the time, and that's what I told the grand jury. Carey must know there's nothing I could have done about going before the grand jury. When you get a subpoena, you have to go.

What I want to know is whether you got a chance to tell Carey that I hadn't said anything to the grand jury. If he said he didn't believe that, I'd like to know what reasons he gave, so I can talk to him about it. I would like to be able to convince him.

I know that you told me Carey might consider my pension at a later date, as he said he would after the Barral case is over with if I am not a witness against Barral. The trouble is that the case has been dragging on for a long time already, and I am out of a job.

I will appreciate hearing from you as soon as possible.

Fraternally yours, /s/ William R. Carter.

February 26, 1964.

Mr. William R. Carter
c/o Mr. Albert Love
4204 18th Street, N.W.
Washington 11, D. C.

Dear Brother Carter:

From the letter you wrote me on February 5, 1964, I would have to say that some of the things you seem to have understood from our conversation are not correct and not what I remember saying or intended to say.

However, to set the record straight, I told you that inasmuch as you were not questioning your discharge and were only interested in obtaining early retirement benefits from the IUE upon your reaching the age of 62. On this basis the officers of the CIO discussed this possibility with President James B. Carey and I reported to you that Jim Carey had stated "that if you (W.R. Carter) would stop embarrassing the IUE-AFL-CIO, that he would be willing to reconsider the question of a pension in April 1964".

This is what I have told you and those are the facts.

I remain, fraternally yours,

ANGELO COLELLA,
President CIO.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 608—'64

W. RICHARD CARTER, *Plaintiff,*

v.

JAMES B. CAREY, ET AL, *Defendants.*

AFFIDAVIT

CITY OF ST. LOUIS,
State of Missouri, ss:

Fred Mensch, being duly sworn, deposes and says: I am Treasurer of the Council of Industrial Organizers (known as CIO) a labor organization which represents the field representatives of IUE-AFL-CIO.

On or about November 4, 1963, the office of the CIO, Angelo Colella, Robert Klingensmith, and I, met with President Carey of IUE-AFL-CIO, to discuss matters of business between the CIO and IUE. The meeting was scheduled in connection with negotiation of a wage increase under a reopener in our agreement. During this meeting, the subject of the discharge of Richard Carter was discussed. We asked Mr. Carey what were the reasons for Mr. Carter's discharge. We told him that Mr. Carter had not filed a grievance, but that we were aware that Carter was interested in a pension as of April 29, 1964, when he would reach age 62. Mr. Carey explained to us the reasons for Mr. Carter's discharge and we explored with him possible alterations, aside from reinstatement. No conclusions or agreements were reached.

On December 5, 1963, the CIO Officers had a quarterly meeting with Mr. Carey as contemplated by our agreement for discussion of problems and matters of mutual interest. During this meeting, the question of Mr. Carter's status was again raised and discussed. Again no agreements were reached with respect to him.

On the evening of December 4, 1963, the CIO Executive

Board held a periodic meeting at which a number of items of business were discussed. In the course of that meeting, the officers reported to the Executive Board our discussions with Mr. Carey with respect to Mr. Carter. The Board was of the unanimous view that no further action by CIO was warranted.

To the best of my knowledge, Mr. Carter never filed a grievance with the CIO complaining that his discharge was not for just cause nor did he ever request the CIO to seek arbitration on his behalf.

Despite the absence of such a grievance, the officers of the CIO explored the causes of his discharge and the possible alternatives which might be available to Carter. We discussed the possibility of a subsequent pension for Carter although he never requested the pension then available under the pension plan in of IUE field representatives.

Neither I, nor to my knowledge any other officer or Board member of CIO have any personal interest in preventing the reemployment of Mr. Carter by IUE. We have given him full and fair representation. At no time to my knowledge has Carter complained that he was not fairly represented by CIO. He has not submitted to the CIO Officers or Executive Board any complaint or criticism of our actions, nor has he requested any reconsideration of them.

FRED MENSCH.

State of Missouri,
City of St. Louis, ss:

On this 12th day of May, 1964 before me personally appeared Fred Mensch who was duly sworn and affixed his signature to this affidavit and swore the statements were true to the best of his knowledge and belief.

/s/ JOHN M. SCHOBEL,
Notary Public.

My commission expires January 11, 1965.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 608-'64

W. RICHARD CARTER, *Plaintiff*,

v.

JAMES B. CAREY, *et al.*, *Defendants*.

PLAINTIFF'S AFFIDAVIT IN OPPOSITION TO MOTION TO STAY

DISTRICT OF COLUMBIA, SS:

W. RICHARD CARTER, being duly sworn, deposes and says:

1. I am the plaintiff in the above-captioned case.

2. After my discharge by defendant IUE, I requested my union, the Council of Industrial Organizers, by telegram to its President Angelo Colella dated September 17, 1963, to process a grievance on my behalf.

3. On or about September 20, 1963, I telephoned Mr. Colella, informed him of the details concerning my discharge, stated that I believed that I had been unjustly discharged, and requested that my union proceed with defendant IUE to grieve my case. Mr. Colella said that he would.

4. On or about October 1, 1963, I telephoned Mr. Colella to ask what my union had done for me. Mr. Colella informed me that they had not yet done anything, but that he had spoken to defendant Carey by telephone, and would speak to him again in Boston, Mass, by Friday of that week, October 4, 1963, but Mr. Colella did not sound as though he would do very much for me.

5. I tried several times thereafter to reach Mr. Colella by telephone, but he did not return my calls.

6. On October 8, 1963, I wrote to Mr. Colella, informed him that I had been unable to learn from him about the status of my case, and said that I wished to contact some-

one with the union in Washington with whom to take up my case.

7. I received a letter from Mr. Colella dated October 18, 1963, which ignored the fact that I had stated that I was contesting my discharge, and stated, among other things:

> It is my opinion that you did not help our case, when you seem (sic) fit to take your IUE problem outside the CIO and the IUE-AFL-CIO. As a matter of fact, I feel that it is embarassing to all concerned.

8. I was not able to see Mr. Colella again until on or about December 10, 1963. At that time, he met me in the Lafayette Hotel in Washington, D. C. He was accompanied by Mr. Fred Mensch and Mr. Robert Klingensmith, the other two officers of my union. Mr. Colella took me to his room, and explained that they had just seen defendant Carey, and that as a result of that conference, Mr. Mensch and Mr. Klingensmith were too frightened even to talk to me.

9. At that time, Mr. Colella told me that he felt there was nothing further to do for me, and that defendant Carey had threatened to discharge him for even bringing my case to him.

10. I told Mr. Colella that I still felt my discharge was unjust, and I called the arbitration provision in the contract to his attention.

11. My union has refused to proceed further with my case, and I feel that it is too hostile to me to do so.

12. Mr. Colella is a defendant in the cases arising out of the indictments returned by the grand jury before which I testified, and has acted toward my case with a view toward his own interest and in a hostile manner. The other officers were too intimidated to even talk to me, and I have been told that the members of the union generally have been stirred up against me by charges that I was responsible for investigations of possible staff wrong-doing.

13. I do not believe that any further grievance or arbitra-

tion proceedings would be fair to me, in view of the hostility to my case of my union.

/s/ W. Richard Carter.

Subscribed and sworn to before me this 22nd day of May, 1964.

/s/ Clyde G. Grubb,
Notary Public, D.C.

My commission expires June 15, 1966.

In the United States District Court for the District of Columbia

Civil Action No. 608-'64

W. Richard Carter, *Plaintiff*,

v.

James B. Carey, *et al.*, *Defendants*.

Order

Upon consideration of the motion of the defendants to dismiss, or in the alternative to stay, and motion to strike, the defendants' memorandum of points and authorities, the memorandum of points and authorities in opposition thereto, and argument of counsel, it is, this 22 day of June, 1964.

Ordered:

1. That the motion to dismiss the amended complaint as to the defendant, the International Union of Electrical, Radio and Machine Workers, AFL-CIO be denied;
2. That the motion to dismiss the amended complaint as to the defendant James B. Carey be denied;
3. That the motion to strike allegations from the Complaint be denied;
4. That the alternative motion to stay the proceedings, pending exhaustion of plaintiff's contractual remedies, be denied.

/s/ Alexander Holtzoff,
Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 608-64

W. RICHARD CARTER, *Plaintiff*,

v.

JAMES B. CAREY

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Defendants*.

NOTICE OF APPEAL

Notice is hereby given that Defendants, International Union of Electrical, Radio and Machine Workers, AFL-CIO, and James B. Carey, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order, entered on June 22, 1964, denying a stay of this action pending exhaustion of plaintiff's contractual remedies.

Respectfully submitted,

/s/ BENJAMIN C. SIGAL,
David S. Davidson,
1126 16th Street, N.W.
Washington 6, D.C.
Attorneys for Defendants.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 608-64

W. RICHARD CARTER, *Plaintiff*,

v.

JAMES B. CAREY

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Defendants*.

ORDER AUTHORIZING TRANSMITTAL OF ORIGINAL RECORD

Upon consideration of the oral motion of counsel it is by the Court this 30th day of June, 1964.

ORDERED, that the Clerk be and he hereby is authorized to transmit forthwith the entire original record filed herein in this cause to the United States Court of Appeals for the District of Columbia Circuit.

/s/ ALEXANDER HOLTZOFF,
Judge.

(2179-0)

BRIEF FOR APPELLEE
AND MOTION TO DISMISS AS TO APPELLANT CAREY

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,735

JAMES B. CAREY
and
INTERNATIONAL UNION OF ELECTRICAL,
RADIO & MACHINE WORKERS,

Appellants,

v.

W. RICHARD CARTER,

Appellee.

On Appeal from an Order of the United States District Court
for the District of Columbia

RICHARD J. SCUPI
HAL WITT

600 F Street, N. W.
Washington 4, D. C.

Attorneys for Appellee

COUNTERSTATEMENT OF QUESTIONS PRESENTED

In the opinion of appellee, the questions are:

1. Whether a defendant who is sued in tort for maliciously causing plaintiff's discharge is properly a party appellant in an interlocutory appeal by a co-defendant, sued for breach of contract, from the denial of a stay pending arbitration of the breach of contract claim.

2. Whether it is proper to stay a discharged employee's action for damages for breach of a collective bargaining agreement containing an arbitration clause where the employee alleges that his union is hostile to his cause.

3. Whether the District Court erred in refusing to remit the discharged employee to arbitration under the circumstances of this case, where the employee's complaint alleges that his union was incapable of representing him fairly, in view of the interest of its president in the reasons for the employee's discharge.

INDEX

TABLE OF CASES

OTHER AUTHORITIES

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,735

JAMES B. CAREY
and
INTERNATIONAL UNION OF ELECTRICAL,
RADIO & MACHINE WORKERS,

Appellants,

v.

W. RICHARD CARTER,

Appellee.

On Appeal from an Order of the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE
AND MOTION TO DISMISS AS TO APPELLANT CAREY

COUNTERSTATEMENT OF THE CASE

This is an action by a discharged employee (appellee) against his former employer (appellant IUE) for breach of contract, and against a third party (appellant Carey) for malicious interference with an employment relationship.

Appellant International Union of Electrical, Radio and Machine Workers (IUE) employs field representatives who are represented by a labor organization called the Council of Industrial Organizers (Council) (J.A. 1-2). Appellant Carey is the President of IUE (J.A. 1). On September 13, 1963, appellee Carter was discharged as a field representative by IUE (J.A. 2). The amended complaint[1] sets forth the circumstances of Carter's discharge as follows.

Carter had been employed by IUE since 1949 and had performed his services in a competent, satisfactory and loyal manner, when, in 1961, he was placed in charge of IUE's Puerto Rico office (J.A. 2). During 1962, the United States Department of Justice investigated the financial dealings of IUE representatives in Puerto Rico (J.A. 2). Early in 1963, Carter was subpoenaed to testify before a federal grand jury with respect to such matters, and did appear and testify (J.A. 2). In February, 1963, the grand jury returned indictments against, among others, Andrew Barral and Angelo Colella charging conspiracy to embezzle funds of a labor organization and embezzlement of union funds (J.A. 2-3).

Both Barral and Colella were then aligned with appellant Carey in the internal politics of IUE (J.A. 3). Barral was Carter's predecessor in office, and Colella had been assigned to Puerto Rico before Carter arrived (J.A. 2). Colella was also the President of Carter's union, the Council (J.A. 2), one of whose functions is to protect its members against unjustified discharges (J.A. 7-8). In September, 1963, Carey caused the IUE to discharge Carter in reprisal for his testimony before the grand jury and to prevent him from testifying at the trial of Barral and Colella (J.A. 3).

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[1] Any references to the "complaint" herein are to the amended complaint (J.A. 1-5).

At the time of his discharge, Carter was almost eligible to retire on an IUE pension. His discharge, at age 61-1/2, rendered Carter ineligible for a pension (J.A. 4).[2]

Thus, Carter was confronted with the fact that the grievance machinery, which, according to the IUE-Council agreement, should protect his interests, was under Colella's control and Colella was of course one of the persons whom Carey was seeking to protect by discharging Carter. Carter notified Colella of his discharge and then informed him that his discharge was unjustified and that therefore the Council should proceed on his behalf (J.A. 21). Colella stated that he would (J.A. 21). After Colella and the other Council officers spoke to Carey about Carter's case,[3] Colella informed Carter that he could do nothing for him, and that he, Colella, would be discharged by Carey if he pursued Carter's interests further (J.A. 22). Carter brought to Colella's attention the arbitration provisions of the IUE-Council agreement (J.A. 22). No further action was taken by the Council in Carter's case (J.A. 22).

Carter's affidavit in opposition to the Motion to Stay[4] further states that at his final discussion with Colella, Colella stated that the other two Council officers were too frightened even to talk to Carter about his case (J.A. 22). The affidavit further states that his dealings with Colella about his case convinced him that Colella had acted "with a view toward his own interest and in a hostile manner" (J.A. 22) and that arbitration under such circumstances, with the Council acting as his representative, would be unfair (J.A. 22-23).

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[2] It is also alleged that Carter found it impossible to find other employment in the trade union movement because Carey has "blacklisted" him (J.A. 4-5).

[3] The final (third) step in the contractual grievance procedure before arbitration is a discussion "between the IUE President . . . and a committee of the Council consisting of the officers of the Council." (J.A. 8).

[4] An affidavit by Colella raises various issues of fact to be resolved at trial.

SUMMARY OF ARGUMENT

1. Appellant Carey may not appeal from the denial of a stay pending arbitration of the breach of contract claim against appellant IUE, because he is not a party aggrieved by that denial. In any event, he is not entitled to the stay because he is not a party to the contract which provides for arbitration, and because he is sued for the tort of maliciously interfering with appellee's employment, so there is no provision for arbitration of appellee's claim against him.

2. It is not necessary for this Court to decide whether, in the absence of allegations that a discharged employee's union is hostile to his cause, the employee may sue his employer without exhausting contractual grievance and arbitration procedures. The law is clear that where hostility is alleged, the employee will not be remitted to arbitration.

3. The complaint and affidavit of appellee in this case sufficiently allege the hostility to his cause of his union and its president. Appellee alleges that he was fired because he testified before a Federal grand jury which indicted the president of his union for embezzlement, and that the specific purpose for his discharge was as a reprisal for that testimony and as an attempted intimidation to prevent him from testifying at the trial of said president. Appellee also alleges that said president treated his case with hostility because of those circumstances. Few cases present greater hostility of the bargaining representative. In view of that hostility, the District Court did not err in declining to remit appellee to arbitration in the circumstances of this case.

ARGUMENT

I. The Appeal of Appellant Carey Should Be Dismissed.

The Complaint in this case is in two counts. The first count states a claim against IUE for breach of the IUE-Council agreement (J.A. 2-4). The second count states a claim in tort against Carey (J.A. 4-5).

The Motion to Stay Pending Arbitration was founded upon the grievance provisions in the IUE-Council agreement. Needless to say, Carey is not a party to that contract.

Carey therefore was not properly a party to the Motion to Stay[5] with which this appeal is concerned.

Appellants complain that the order appealed from denies to them their "contractual rights to have grievances settled through the contractual grievance and arbitration procedure" (Appellants' Brief, p. 24). Carey cannot so complain, for he can assert no such contractual right. Moreover, the claim that he, an outsider, maliciously interfered with appellee's employment, is not a grievance under the contract. The contract does not provide that such a matter be submitted to its grievance and arbitration machinery.

Carey therefore is not a person aggrieved by the order appealed from, and cannot appeal therefrom. Moore's Federal Practice, Vol. 7, par. 73-04, p. 3126. Cf. *United States v. Seigel,* 83 U.S. App. D.C. 88, 168 F.2d 143 (1948); *Heilman v. Ginberg,* 109 U.S. App. D.C. 105, 284 F.2d 239 (1960).

Appellants' Statement of Points in their Brief (p. 5) formulates as their legal position that the arbitration procedures of the contract must be exhausted "before a suit *against the employer for breach of said contract* may be filed or prosecuted." (Emphasis supplied.) Carey is not the employer, and the suit against him is not for breach of contract. Under no view of the law on this point, therefore, could Carey be entitled to a stay.

Finally, no argument made by appellants with respect to the propriety of a stay pending arbitration between IUE and the Council of the

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[5] The Motion to Stay was part of an omnibus motion made by both appellants (J.A. 10-11), and it is not clear on its face whether Carey purported to be a party to the Motion to Stay.

breach of contract claim even suggests that the wholly distinct tort action would appropriately be stayed.

Since Carey was not properly a party to the order appealed from, was not aggrieved by the order, and could not under any view of the law claim the relief sought, his appeal should be dismissed.

In the alternative, since in any event appellant Carey is not entitled to a stay pending arbitration of the claim which is not made against him, the decision below should be affirmed as to him.

II. Appellee's Complaint and Affidavit Sufficiently Allege the Hostility to His Cause of His Union and Its President to Justify the District Court's Refusal to Remit Appellee to Arbitration.

Appellants moved to dismiss Carter's complaint on the ground that he had not exhausted his contractual remedies. The District Court denied that motion, and that denial is not before this Court at this time. The denial of a motion to dismiss is, of course, not appealable. This is an appeal from the denial of a motion to stay. The main part of appellants' brief is devoted to a re-hash of their arguments in support of the motion to dismiss. In point I, appellants argue that appellee was required to exhaust his contractual remedies "as a prerequisite to suit" (Appellants' Brief, p. 9), and cite cases which hold that recourse to grievance and arbitration procedures is a prerequisite to suit. In point II, appellants outline various views of some state courts which would bar all suits by employees against employers for breach of collective bargaining agreements containing grievance machinery. Neither of these arguments supports appellants' contention that, given the denial of the motion to dismiss, the motion to stay should have been granted in this case. There is thus no reason to discuss the cases relied on by appellants in this connection. Suffice it to say that even those cases

which would support dismissal for failure to exhaust recognize that such failure may be excused by union hostility. See, e.g., *Pattenge v. Wagner Iron Works*, 275 Wis. 495, 82 N.W. 2d 172 (1957).[6]

A. The law does not require an employee whose bargaining agent is hostile to his cause to go to arbitration before his suit for wrongful discharge will be heard.

Federal law is not yet settled as to the reasoning under which a wrongfully-discharged employee faced with a hostile bargaining representative may independently seek relief in the courts. It is clear, however, that in such a situation, legal relief is available.

1. Some cases adopt the view that an individual employee who, like appellee here, seeks damages and not reinstatement has an unqualified right of action for damages and is not required to resort to employer-union arbitration channels, even in the absence of union hostility. The Court of Appeals for the Fifth Circuit has held:

> Grievance procedure is appropriate if an aggrieved employee challenges his suspension or discharge with the hope of reinstatement and continuance of his former employment status . . . . But a discharged employee may have a common law right of action for damages for breach of contract. He does not lose this right if he elects to use the courts instead of employer-union arbitration channels. *Woodward Iron Co. v. Ware*, 261 F.2d 138, 141 (1958).

The court grounded its decision upon the following reasoning:

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[6] In fact, in the only case cited by appellants which did involve allegations of union hostility, Jenkins v. Schluderberg-Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958), the court held that such allegations are sufficient to excuse a failure to exhaust contractual remedies, even if such exhaustion were otherwise required. 144 A.2d, at 93 and 99. And in two of the other cases cited by appellants, the courts either explicitly noted that there was no allegation of hostility involved, Smith v. General Electric Co., 63 Wash. 2d 627, 388 P.2d 550, 551 (1964), or that there are exceptions to the rule requiring exhaustion, as where the union is hostile to the employee. Rowan v. McKee, 262 Minn. 375, 114 N.W. 2d 692, 698 (1962).

> Resort to grievance procedures makes sense when arbitration of an employee's claim affects an aggrieved employee's continuing relations with his employer or if it affects other employees or if it affects union-company relations and future bargaining. *Id.*, at 142.

See also *Patrick v. Esso Standard Oil Co.*, 156 F. Supp. 336 (D.N.J., 1957).

A case from the Alabama Supreme Court following this view is now pending before the Supreme Court of the United States. *Republic Steel v. Maddox*, 275 Ala. 685, 158 So.2d 492 (1963), cert. granted, 377 U.S. 904. Under this view, of course, a stay of this action was not required.

2. On the other extreme, some cases have held, especially in New York, that an individual employee has no legal remedy; he must rely upon his union, and is always bound by its actions. See, e.g., *Parker v. Borock*, 5 N.Y.2d 156, 156 N.E. 2d 297 (1957); *Guszkowski v. U. S. Trucking Co.*, 162 F. Supp. 847 (D.N.J., 1958). A related position is that the employee's only remedy against the employer is a joint action against it and his union based upon a breach of the union's fiduciary duty toward the employee and the employer's participation therein. *Falsetti v. Local 2026, UMWA*, 400 Pa. 145, 161 A.2d 882 (1960); *Ostrofsky v. United Steelworkers*, 171 F. Supp. 782 (D. Md., 1959). These are the cases principally relied on by appellants. Under either of these approaches, however, a stay was not required. These cases do not suggest that arbitration is a necessary prerequisite to legal action. While they suggest that the denial of the motion to dismiss was erroneous, they do not support a motion to stay, since the legal action would be as improper after arbitration as before.[7]

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[7] Under another view, adopted only in New Jersey, Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963), the individual employee must request the employer to arbitrate with him personally as a prerequisite to suit, if the union has a conflicting interest. Again, this is merely grounds for dismissal of this

(continued on following page)

3. The cases which are actually relevant here are those, state and federal, which recognize that when the discharged employee's complaint sets out a clear conflict of interest between the employee and the union, or a demonstrated hostility on the part of the union, the employee's rights in the courts are not conditioned upon resort to a hostile or unavailing procedure.

> We do not construe the contract or the law as requiring an individual employee to invoke this grievance procedure to assert an accrued pecuniary claim in circumstances where it is reasonably apparent that the union is hostile to him and will not give him adequate representation. To do so would place the employee's accrued rights against his employer more or less at the mercy of an unfriendly union. *Pattenge v. Wagner Iron Works*, 275 Wis. 495, 82 N.W. 2d 172, 174 (1957).

See also, e.g., *Henderson v. Eastern Gas & Fuel Associates*, 290 F.2d 677, 681, note 5 (C.A. 4, 1961); *Jenkins v. Schluderberg-Kurdle Co.*, 217 Md. 556, 144 A.2d 88 (1958); *United States v. Voges*, 124 F. Supp. 543, 546 (E.D. N.Y., 1954); *Nichols v. National Tube Co.*, 122 F. Supp. 726 (N.D. Ohio, 1954); *In re Norwalk Tire & Rubber Co.*, 100 F. Supp. 706 (D. Conn., 1951); *Terrell v. Local Lodge 758*, 141 Cal. App. 2d 17, 296 P.2d 100 (1956). The issue has expressly been left open by the

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7 (continued from preceding page)
action, not for a stay. But, on the merits, the remedy for the employee which New Jersey has adopted is an unrealistic one, and poses far more problems than it purports to solve. The forum of labor arbitration has been created by employers and unions to resolve their conflicts and satisfy their organizational needs. Naturally, and properly, the personnel, procedures, and substantive approaches of such arbitration have not developed so as to provide protection for, or even recognition of, individual employee rights not championed by either traditional party. (It is therefore understandable that appellant International Union of Electrical, Radio & Machine Workers does not even suggest to this Court that it follow the New Jersey approach.) Professional arbitrators are generally dependent for their own employment upon the good will of the collective parties. Thus, it is difficult for the system to provide a fair hearing for an individual who is opposed by both collective parties. Such considerations indicate that for appellee's case to be submitted to the forum of arbitration, when the hostility of the union and employer both are extraordinarily strong, would be the promise of a remedy to the ear, but one sure to be broken to the hope.

Court of Appeals for the Second Circuit in *Belk v. Allied Aviation Service Co.*, 315 F.2d 513, 516 (1963).

Whatever view as to the right of employees to sue absent union hostility the Supreme Court may adopt, we submit that it is clear that at least an exception will remain permitting suit when union hostility is present. Only such a rule can fairly resolve the competing policies and interests involved.

Given this state of the law, appellants misconceive their position in this Court in arguing that "despite a divergency of views as to the remedy available to an employee in these circumstances, none would support this damage action" (Appellants' Brief, p. 12). This is not an appeal from the denial of the motion to dismiss the complaint, however much appellants treat it as such, and it is therefore irrelevant which views "support this damage action." The question here is, which view, if any, required the District Court to stay this action; and if there is such a view, is it now to be held to be the federal law. Understandably appellants do not pose this issue, the only relevant one, for to do so points up the conclusion that all other views do not require a stay to be granted, and thus all support appellee's position in this Court.

In short, it is not necessary for this Court to reach the question of whether a discharged employee may sue without first going to arbitration, in the absence of allegations of hostility, for in this case there are such allegations. As is pointed out above, there is no authority (except for the "New York" view, which supports dismissal but not a stay) supporting the view that arbitration is required when the union is hostile.

In fact, the only approaches which would support appellants here, in their claim that the District Court erred in failing to stay this action pending arbitration, are, first, that no amount of union hostility to an employee's cause can justify the court's refusal to remit the employee

to arbitration, or, second, that appellee did not sufficiently allege hostility in this case to justify the decision of the court below not to order arbitration. The first approach is clearly invalid, on its face and under the cases cited above. We turn, therefore, to the central question on this appeal, which is whether appellee's allegations of hostility to his cause on the part of his bargaining representative were sufficient to justify the action of the court below.

B. Appellee's complaint and affidavit contain sufficient allegations that his bargaining representative is hostile to his cause.

Carter's complaint alleges that he was discharged by his employer, appellant IUE, in reprisal for having testified before a Federal grand jury in Puerto Rico which indicted several IUE employees on charges of embezzling and conspiring to embezzle IUE funds (Complaint, par. 11, 13; J.A. 2-3). The complaint alleges that Carter's discharge was, in addition to being a reprisal for the grand jury testimony, an attempt to prevent him from testifying at the trials (Complaint, par. 13; J.A. 3). The complaint alleges that the indictments in question are still pending trial (Complaint, par. 11, J.A. 3).

In addition, the complaint alleges that one of those indicted for embezzlement was one Angelo Colella (Complaint, par. 11; J.A. 3), who was and is the President of the Council (Complaint, par. 5, 9; J.A. 2), which is Carter's bargaining agent (Complaint, par. 5-6; J.A. 1-2). Further, the complaint alleges:

> The Council is incapable of fairly representing plaintiff's interests in view of the personal interest of its President Colella in the reasons for plaintiff's discharge. Grievance proceedings and arbitration under the control of the Council as plaintiff's representative would be an unfair and inadequate remedy for defendant IUE's breach of the collective bargaining agreement (Complaint, par. 15; J.A. 4).

Appellee submits that it would be hard to imagine a clearer allegation of union hostility to the cause of a discharged employee. Colella, the president of the union, stands indicted for embezzling the employer's funds. Appellee was fired, not only because he testified before the grand jury which handed down the indictment, but also in order to prevent him from testifying at the trial of Colella. That trial has yet to take place.

Any expectation that the Council, under the guidance and control of its President Colella, would vigorously challenge appellee's discharge, which was calculated to advance Colella's substantial personal interests, would be fanciful at best.

Appellants present only two arguments directed against the sufficiency of appellee's allegations of his union's hostility. First, they say that appellee does not allege that he testified against Colella or anyone else before the grand jury, or that he is to be a witness against them at a trial (Appellants' Brief, pp. 21-22). The content of appellee's testimony is, of course, completely irrelevant. Grand jury proceedings are secret, and appellants, Colella and other IUE and Council personnel do not know the content of appellee's testimony. What is relevant is that they believed his testimony to have been harmful to Colella and others, and that the complaint alleges that he was fired because of that belief, whatever the testimony may have been in fact.

Second, appellants say that, assuming Colella's interest to be hostile to appellee, appellee "alleges nothing which would give rise to a conflict between Carter and the Council, its other officers, executive Board members, or membership in general" (Appellants' Brief, p. 22). Appellants overlook the allegations, in appellee's affidavit in opposition to the motion to stay, that Colella "has acted toward my case with a view toward his own interest and in a hostile manner"; that as a result of a conference with appellant Carey, the other two officers of the Council "were too frightened even to talk to me," and that "the members

of the union generally have been stirred up against me by charges that I was responsible for investigations of possible staff wrongdoing" (J.A. 22). In addition to these very specific allegations of his affidavit, appellee's complaint alleges that the Council is in fact incapable of fairly representing his interest because of President Colella's personal interest in the reasons for the discharge (Complaint, par. 15; J.A. 4).

Even in the absence of the specific allegations that the union membership generally were stirred up against appellee, the only proper inference would be that the union itself is incapable of acting without hostility on behalf of appellee when the union president's interests and attitude are so hostile, in view of the dominant role in union affairs exercised by the union president generally, and specifically, in grievance and arbitration matters. The Council President is the required participant in the second and third steps of the grievance procedure established by the agreement in this case (J.A. 8); as for arbitration, the crucial matter of the selection of the arbitrator is left to the employer and the Council (J.A. 8), presumably acting through their respective presidents. Thus, in terms of this grievance and arbitration procedure, for all practical purposes appellee should need to establish no more than the hostility of the Council President.

Apparently recognizing the weakness of their arguments that appellee did not sufficiently allege the hostility to his cause of his union, appellants devote the bulk of their argument to criticism of appellee's tactics in trying to protect himself. In fact, appellee's grievance was carried to the third and final step of the contractual grievance procedure, a discussion between the IUE President and the three Council officers (J.A. 8). Appellee's request that his union carry the matter to arbitration bore no fruit (J.A. 22). It is understandable that, once his union's hostility to him had become clear, appellee did not attempt to insist upon arbitration, for had he done so, his union could have gone

through the same motions as it did in the grievance procedure, and left appellee with the burden of overcoming an unfavorable arbitration award.[8] Appellee submits that any inadequacy in the efforts he made, following his discharge at age 61-1/2 years after 14 years of service, in the face of the combined hostility of his powerful employer and his own bargaining representative, is irrelevant to the issue before this Court. It is precisely because the difficulties of that situation were insuperable that the law would not foreclose to appellee his one meaningful remedy, an action in a court of law.

CONCLUSION

For the reasons set forth above, the appeal of appellant Carey should be dismissed, or, in the alternative, the order denying a stay should be affirmed as to him; and the order denying a stay as to appellant IUE should also be affirmed.

Respectfully submitted,

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Attorneys for Appellee

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[8] Appellants' suggestion that appellee would not be prejudiced if he is required to go through the contractually stated arbitration is quite inaccurate. Appellants well know that the burden under which appellee would labor after he emerges from such arbitration would be redoubled by the need to overcome the presumption of validity of an award in appellants' favor. The questions raised in this case are particularly appropriate for consideration in court. They do not involve the kind of problems of day-to-day administration of the employer-union relationship on the job for which arbitration procedures are best suited. Appellants have cited no authority or reason for depriving appellee of the day in court to which the court below held he was entitled.

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(2)

REPLY BRIEF FOR APPELLANTS AND OPPOSITION TO MOTION TO DISMISS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,735

JAMES B. CAREY AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, APPELLANTS,

v.

W. RICHARD CARTER, APPELLEE

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
1126 16th Street, N.W.,
Washington, D.C. 20036.
Attorneys for Appellants.

INDEX

Table of Authorities

Cases:

ARGUMENT

I. Defendant Carey Is a Proper Appellant Whose Appeal Should Be Granted

Appellant Carey was a party below, named as a defendant in the complaint filed by appellee (J.A. 1). The complaint demanded judgment against both defendants below "and each of them" for the full damages alleged in both counts of the complaint, as well as additional punitive damages (J.A. 5). The Motion to Dismiss, or In the Alternative To Stay, and Motion To Strike was on its face filed in the District Court by both defendants (J.A. 10). Carey clearly is "a party [who] may appeal from a judgment by filing with the district court a notice of appeal"[1] Rule 73, Federal Rules of Civil Procedure.

While the above is sufficient to establish Carey's right to appeal it is also clear from the record that having sought a stay and having been denied it, Carey is also aggrieved. Appellee's motion to dismiss as to appellant Carey should therefore be denied.

Turning to the merits of the motion to stay, it is clear that if stay should be granted as to one defendant, it should be granted as to both. Appellee, not appellants, chose to join both appellants as defendants in a single law suit and to seek to impose liability for both counts on both appellants. Moreover, the second count, which alleges that Carey engaged in tortious conduct, is intertwined with the first count which it incorporates. For the allegation is that

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[1] This is not a case, such as those on which appellee relies, in which one who was not a party in the District Court and over whom that court lacks jurisdiction seeks to enter the case at the appellate level by filing a notice of appeal. *United States* v. *Seigel*, 83 U.S. App. D.C. 88, 168 F. 2d 143 (1948); *Heilman* v. *Ginberg*, 109 U.S. App. D.C. 105, 284 F. 2d 239 (1960).

Carey wrongfully and maliciously caused plaintiff to be discharged "for the reasons set forth in paragraph 13 above, in violation of plaintiff's rights under the aforesaid agreement" (J.A. 4). Thus the merit of appellee's claim of tort liability based on Carey's alleged procurement of Carter's discharge rests upon the success of the allegation of breach of contract in the first count. If a stay were granted as to IUE and not Carey, the underlying issue of breach of contract would thus be split and follow two paths leading to possible inconsistent results.

Appellee would have it appear that the breach of contract count goes only to defendant IUE while the tort count goes only to defendant Carey. Both its allegations and its claim for relief reveal that they are not separate. Both counts are intertwined and go to both defendants.

In these circumstances, if a stay is appropriate, it is a stay of the entire action which is appropriate and not merely as to one defendant.

II. A Stay Should Have Been Entered

Appellee contends that appellants are seeking to relitigate their motion to dismiss, and that even if their views as to exhaustion of remedies were correct, dismissal and not a stay would be required. Appellee's contention is unsupported and invalid. Appellee ignores the authorities cited in appellant's brief, pp. 23-24, which support a stay, rather than dismissal, when an action is commenced without having exhausted contractual remedies,[2] and offers nothing to refute or distinguish them. Moreover, the presence of the second count in the complaint, which de-

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[2] See also *Shanferoke Coal & Supply Co.* v. *Westchester Service Corp.*, 293 U.S. 449, 452-453 (1935); *Kolokundis Shipping Co.* v. *Amtorg Trading Co.*, 126 F. 2d 987, 986-988 (C.A. 2, 1942).

pends upon the resolution of the claimed contract breach, gives added reason to support a stay, rather than dismissal in this case. Thus, if appellants are correct that appellee cannot avoid his failure to exhaust remedies, the conclusion that a stay must be entered is unchallenged by appellee except by unreasoned and unsupported conclusionary assertion.

Appellee's contention that his allegations of hostility of his union are the password gaining him access to direct suit against his employer are not supported by the authorities on which he relies. A careful reading of *Jenkins* v. *Schluderberg-Kurdle Co.*, 217 Md. 556, 144 A. 2d 88 (1958), discloses that the Maryland court in adopting Professor Cox's view (Appellant's brief, 13-14) did not hold "that such allegations are sufficient to excuse a failure to exhaust contractual remedies, even if such exhaustion were otherwise required". (Appellee's Brief, 7, n. 6). In that case, the court reversed dismissal of a suit arising out of a discharge from employment brought by an employee against an employer, and remanded the case for further proceedings. But the court carefully refrained from spelling out what further proceedings were to ensue. While not prepared to say "at this time" that the union was a necessary party, it expressed belief that it was a proper party and suggested availability of relief by way of mandamus or injunction. Thus, the court did not hold that a direct damage action would lie, but merely that an action to enforce whatever rights the union had would lie, and the possibility of a stay was neither ruled out nor considered.

Pattenge v. *Wagner Iron Works*, 275 Wis. 495, 82 N.W. 2d 172 (1957), on which appellee places principal reliance, was a suit for vacation pay which followed *Association of*

Westinghouse Salaried Employees v. *Westinghouse Corp.*, 348 U.S. 437, and rests on the distinction between individual claims and union claims. The overruling of the Westinghouse decision in *Smith* v. *Evening News Association*, 371 U.S. 195, 199 (Appellant's Brief 9, n. 3) makes it clear that *Pattenge* does not state the federal law.[3] In re *Norwalk Tire & Rubber Co.*, (D.Conn., 1951), suffers from the same infirmities.[4]

Appellee's other authorities likewise do not support its claim. *Henderson* v. *Eastern Gas & Fuel Associates*, 290 F. 2d 677 (C.A. 4, 1961), did not involve allegations of union hostility. The portion relied upon by appellee notes in passing that the only exception to the rule requiring exhaustion of remedies "would be perhaps" where the settlement reached between union and employer is arbitrary or unlawfully discriminates against the employee, 290 F. 2d, at 681, n. 5. This note, which only raises a possibility, moreover cites Professor Cox and at most reflects interest in the approach followed by the Maryland court in the *Jenkins* case, *supra*. *United States* v. *Voges*, 124 F. Supp. 543, 546 (E.D.N.Y., 1954) and *Rowan* v. *McKee*, 262 Minn. 375, 114 N.W. 2d 692, 698 (1962), establish no more than *Henderson*.

Nichols v. *National Tube Co.*, 122 F. Supp. 726 (N.D. Ohio, 1954), was not only reversed on appeal, 229 F. 2d 396 (C.A. 6, 1956), but involved a non-arbitrable grievance and the contention that the employer, and not the bargain-

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[3] *Pattenge*, decided under state law, also predates the major developments in federal law which reshaped the entire approach to enforcement of collective bargaining agreements (Appellant's Brief, 9-11).

[4] Twelve years after *Norwalk* was decided, the Second Circuit, in which Connecticut lies, although aware of *Norwalk*, left this issue open in that Circuit. *Belk* v. *Allied Aviation Service Co.*, 315 F. 2d 513, 516 (1963).

ing representative, had made resort to the grievance procedure futile.[5]

Thus, appellee cannot establish that failure to exhaust contractual remedies is excused by a showing of union hostility, and is left with its reliance on the antique Alabama law expressed in *Woodward Iron Co.* v. *Ware,* 261 F. 2d 138, 141 (C.A. 5, 1958) and *Republic Steel* v. *Maddox,* 275 Ala. 685, 158 So. 2d 492 (1963) cert. granted 377 U.S. 904, which stands almost alone in its hostility to arbitration. (Appellant's Brief, 10).[6]

Appellee in his brief also fails to come to grips with the fatal defects in the allegations of fact he advances to excuse his failure to exhaust contractual remedies. However much he may wish to confine consideration to his own allegations, as he elsewhere points out, it is the motion to stay and not the motion to dismiss which is the subject of the appeal, and the merit of the appeal from denial of the motion to stay must be decided on the entire record (Appellant's Brief, 17, n. 19).

Appellee ignores completely his failure to allege or claim that he ever grieved his discharge (Appellant's Brief, 17-20),[7] referring generally to his "grievance" without attempting to establish its nature (Appellee's Brief, 13). Indeed, this implicit confession that Carter never grieved his discharge by itself warrants a stay of this action.

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[5] *Terrell* v. *Local Lodge 758,* 141 Cal. App. 2d 17, 296 P. 2d 100 (1956), sustains a dismissal of an employee damage action where the employer and union refused to take his discharge to arbitration. It does not support Appellee's claim, but is contrary to it.

[6] *Patrick* v. *Esso Standard Oil Co.,* 156 F. Supp. 336 (D.N.J., 1957) followed New Jersey law since discarded. See *Donnelly* v. *United Fruit Co.,* 40 N.J. 61, 190 A.2d 825 (1963).

[7] In addition to cases there cited, see also *Jenkins* v. *Schluderberg, Kurdle Co., supra,* 217 Md. 556, 561-562, 144 A. 2d 88, 91 (1958); Cox, *Rights Under a Labor Agreement,* 69 Harv. L. Rev. 601, at 647-648.

Appellee's contentions that he had adequately established the hostility of his union are adequately answered in appellant's initial brief (pp. 21-23) which warrants no repetition. The assertion that appellants now seek to foreclose to appellee his one meaningful remedy is unsupported and displays at best a myopic view of the scheme of rights and duties surrounding the collective bargaining relationship.[8]

Appellee seeks to gain the advantage of the bargain his union made while ignoring the obligations it imposed, forgetting that absent the agreement he would have no claim at all. (See Appellant's Brief, 11, n. 6). His action must be stayed until he has satisfied the obligations as well.

CONCLUSION

For the reasons set forth above, appellee's motion to dismiss as to appellant Carey should be denied and the relief requested in appellant's initial brief should be granted.

Respectfully submitted,

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DAVID S. DAVIDSON,
Attorneys for Appellants.

November 2, 1964.

(3084-1)

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[8] The additional assertion that discharge cases do not involve the kinds of problems for which arbitration procedures are best suited is characteristically unsupported and contrary to all authority. See Shulman, *Reason, Contract, & Law in Labor Relations*, 68 Harv. L. Rev. 999, 1006-1007, 1015-1018, 1024; Stessin, *Employee Discipline* (BNA Incorporated, Washington, D.C., 1960), Chapters 2-4; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).